rimina
bscenity

by

John Ford

LIBRARY
MANCHESTER COLLEGE

LIBRARY
MANCHESTER COLLEGE

Digitized by the Internet Archive
in 2026

https://archive.org/details/criminalobscenit0000john

CRIMINAL OBSCENITY

Criminal Obscenity

A Plea for Its Suppression

By
JOHN FORD
Justice of the Supreme Court
of the State of New York

NEW YORK CHICAGO
Fleming H. Revell Company
LONDON AND EDINBURGH

Copyright, MCMXXVI, by
FLEMING H. REVELL COMPANY

New York: 158 Fifth Avenue
Chicago: 17 North Wabash Ave.
London: 21 Paternoster Square
Edinburgh: 99 George Street

F19.1
J75

To my infant granddaughter

VIRGINIA

in the fond hope that throughout her girlhood her pure soul may not be tainted or her innocent mind defiled through contact with impure prints, plays or pictures; and that her young life may unfold unto noble womanhood immaculate as the heart of a rose unsullied by mortal touch.

13924

PREFACE

ALTHOUGH the suppression of obscene publications has always been the public policy of the States of the Union coupled with the coöperation of the Federal Government so far as its jurisdiction extends, nothing in permanent form has been written on the subject outside the reports of the criminal courts. And notwithstanding the scores of anti-obscenity laws, printed and pictured pornography has descended upon the public in flood volume since the World War.

All that this country holds most precious in its social structure is threatened with destruction by reason of the depraving literature, plays and pictures which have taken possession of the publishing and theatrical fields. The established family idea of one man and one woman with their children, is to give place to the promiscuity of the herd. Gross human passions are to have loose rein in what is called " free expression of self." That is what is taught to American children in book, play and picture of to-day. Sexual immorality is glorified and every form of depravity is depicted as the source of ecstatic pleasure to be indulged in without fear of God or man. Virtue is made to appear ignoble, vice is deified, matrimony treated with cynical contempt and motherhood with scorn.

Fidelity to marriage vows is looked upon as an anachronism. Chastity and continence are characteristics of the prude and the mollycoddle and condemned as injurious to health and destructive of mental vigour. The morality taught by church and parent belongs to a bygone age. Such are the baleful doctrines instilled into the minds of our children and young people whose newly-flowered emotions, straining at the leash of self-control, need but slight stimulus to break from the restraints imposed by religion and morality and to start the immature of mind and character on the road to bodily and spiritual ruin.

Are the forces of morality going to submit supinely to the domination of the arrogant few who, for sordid gain, have usurped the place of church and parent as the teachers of youth? Why should decent men and women permit this usurpation when they outnumber the enemies of their homes by five to one?

To stir them into united action is the mission of this book. While frankly propagandist it is mainly informative and deals exclusively with obvious truths and demonstrable facts. It is written with the hope that in some degree it may help along the movement for the speedy elimination of the elements of vileness and obscenity from current literature.

J. F.

New York, N. Y.

CONTENTS

I.	Danger Signs	11
II.	No Censorship	18
III.	Liberty of the Press	28
IV.	The Bible, Shakespeare and Other Classics	32
V.	Authors' Condemnation	38
VI.	New York's Problem	52
VII.	Summation of Conditions	59
VIII.	New York's Old Law Emasculated	66
IX.	Salute Massachusetts	71
X.	Federal Laws Unenforced	74
XI.	The Voice of the World	81
XII.	Looking Forward	90
	Appendices:	
	1. The Law of England	95
	2. The King v. Curl	98
	3. The Queen v. Hecklin	102
	4. The United States v. Harmon	108
	5. The People v. Muller	119
	6. Commonwealth of Massachusetts v. Buckley	125
	7. American Laws and Statutes Against Obscenity	134
	Additional Laws and Statutes Against Obscenity	142

I

DANGER SIGNS

THOSE who believe in the exalted mission of American democracy and hope for the fulfillment of its sublime destiny as the archetype in free government for other peoples, may well take serious thought of the growing toleration by the public of the shockingly immoral publications which have come into the hands of the rising generation.

The laws declaring the circulation of such publications a crime, were, down to the period of the World War, generally effective. Then the barriers were lowered permitting the purveyors of licentiousness to pervert the minds and pollute the souls of our sons and daughters. This is strong language; but no language is strong enough to adequately picture the depths of infamy to which certain publishers have descended in issuing for general circulation obscene, lewd, lascivious, immoral, filthy, indecent, impure and disgusting books, magazines, pamphlets and other prints. Those eight adjectives are taken from the law itself, which selects them to describe the character of publications which are prohibited from being published.

Sodom and Gomorrah were not the only cities

which fell through corruption of the morals of their people. Many cities and nations have risen, flourished and died since their day and the downfall of every one of them was presaged by a growing sexual laxity and a prevailing indifference to an insistence on the maintenance of public morality.

No country in the world has had so high a standard of personal conduct in this respect as our own. The foundation stones of the Republic's greatness were laid on the bedrock of sound morality. Nowhere in all the world has womanhood been so exalted and reverenced as in the United States, which has won for itself among the nations of the earth the proud title of " The Paradise of Women."

" The grandeur that was Rome " was won while her people adhered to their ancient rigid code of moral conduct. When the sterling virtues of the republic gave way to the profligacy of the empire Rome's doom was sealed as surely as that of Sodom and Gomorrah.

It requires but a cursory examination of existing conditions to realize how we, in this country, have begun to drift away from our old moral ideals within the past few years. Whether this be due to an essential drop in moral tone or comes as part of the aftermath of the World War is a moot question. Probably it should be regarded as one of the well-nigh countless evils which the war-demons scattered over the face of the whole earth.

But it is a waste of energy to debate the character of the agencies which have brought about the change. Enough that it has been wrought, and the fact is a challenge to every moral teacher, to every parent, every patriot in the land to do battle against the immoral influences the tendencies of which are to corrupt private and public morals and undermine the social structure of the nation.

In the theatres, debasing plays are produced, which are not merely tolerated, but greeted with loud acclaim by crowded houses. But, after all, the theatrical phase of this propaganda of immorality is not nearly so insidious and difficult to combat as that which is effected by depraving publications.

Printed obscenity has countless distributing agencies and preys upon the souls and bodies of millions in secret. Once permit an immoral publication to go into print and it becomes a source of evil influences from generation to generation. The high price of admission charged for a single evening at an indecent show, sets a limit on the scope of its evil influence. As a rule, parents are able to keep a check upon the attendance of their children at the theatres. Not so with printed immorality. It is obtainable by young and old at news stands, at stationery stores, and from circulating libraries at a nominal cost. And the fact is that bad as some theatrical shows are, their promoters would not dare to produce the hideous depravity that is

hidden from general knowledge between the covers of many books, magazines and pamphlets now in free circulation.

In every group or gang of boys—how far is this true of girls?—there is always a precocious youngster prematurely versed in the ways of wickedness. He acquires knowledge of everything evil and introduces his companions to it. If there is a particularly salacious book newly issued he has seen it and pridefully tells his companions all about it—where it may be obtained, what its cost and the particular pages on which the lurid passages may be found. Quite often he, or one or more of the others get the publication and it is handed around until the whole band is made familiar with its soul-soiling contents. One may no more measure the power for evil radiated from a bad book than circumscribe the infinity of space. It may live for ages as potent to debase and defile the last as the first generation into whose hands it comes.

Parents are practically helpless to protect their children from the contamination of printed immorality. Under present conditions it is around them everywhere. Excluded from the home, it will be read outside if indeed it be not smuggled in, despite parental vigilance.

But what shall be said of the large families of children, particularly in large cities, whose parents cannot read English? Happily some are so circumstanced as to be able to safeguard their children.

But what of the multitude of parents whose occupations and educational limitations render them powerless to do so? Such helpless folk should be the objects of the solicitude and care of the more fortunately situated. We live—or should—not unto ourselves alone, but unto others. Our creed should be broader than that of the old farmer who prayed:

"Oh, Lord:
Bless me and my wife,
My son and *his* wife,
Us four, and no more.
Evermore. Amen."

Those who have reached the years of maturity and who possess settled principles of moral conduct are, in some measure, immune from the immorality taught by the stage and the printed story. But it is the rising and future generations which are endangered and our duty to these may not be shirked.

During the dangerous years—say from twelve until manhood and womanhood be reached—when all the wholesome influences that can be marshalled are thrown around their children by parents who desire to keep them clean and pure, it is an indubitable crime to have them subjected to the baleful influence of this printed wickedness. The purveyors of depravity insolently insist upon their right to oust parent and pastor from their

place as moral teachers and to substitute their foul prints as proper guides for old and young. Facts relating to sex should be taught the young, of course; but parents or teachers of their selection and *not* the *blasé literati,* should do the teaching.

The baleful influence of such reading upon the plastic minds of young people is appalling; and there is an unceasing effort on the part of authors of a certain type to undermine the moral principles inculcated by church and parents. Licentiousness is apotheosized by them, self-control ridiculed and the libertine cast in heroic mould.

The baleful book finds its circulation mainly among the youth of both sexes. That is the trade most assiduously sought by conscienceless publishers. But what of the morals of his victims? What kind of citizens and members of society will they become? And how about the future of the country if he be permitted to continue circulating his nefarious stuff? Much *he* knows and nothing he cares!

Then there is the flood of vile periodicals and fugitive prints and pictures all accessible to boys and girls at a few cents' cost. Unless this traffic is stopped, the doom of American manhood has sounded. Our rise to greatness is one of the marvels of history. It is amazing to realize that there are thousands of men yet in robust health who have lived half the age of this great nation! Other nations reached the zenith of their power and

glory only after long centuries of growth and development. When decadence set in with them it was marked always by growing sexual laxity to which reference has already been made in these pages, and the unnatural sensuality inveighed against by the Apostle Paul in his Epistle to the Romans and which is recorded in the Biblical account of the sins of the Cities of the Plain. It seems almost incredible, yet some publications, in free circulation, not merely portray unnatural vice but actually incite to it by extolling in seductive phrase the ecstatic pleasure of such indulgence.

Is the decline of this nation to be as rapid as its rise? Are we to regard the growing disregard of marriage ties, the promiscuity of sexual relations, the profligacy and licentiousness in all forms and the general disregard for the law of the land as the harbinger of national decay? Be it always remembered that these were the first signs of dissolution in every nation which having grown to greatness, are to-day, " one with Nineveh and Tyre."

II

NO CENSORSHIP

ALL talk about censorship is ignorant or dishonest. Censorship of obscenity? There can be no such thing. In any form, the dissemination of obscenity is a crime. Every citizen is required by law to act as a censor of crime, that is, to reveal to the prosecuting officials any knowledge of crime which comes to him and to aid in the apprehension of the criminal and in his prosecution. This sort of censorship has always existed under our institutions and all others of English origin.

Published obscenity was never protected by any law or any constitution. It was always an outlaw to be hunted down and punished wherever found. The freedom of the press has nothing to do with obscenity. Nor did censorship, while it existed in England, concern itself with obscene publications. The fact is that printed obscenity flourished under English censorship—the only kind with which we are concerned. With ecclesiastical censorship, so far as it ever existed, we have nothing to do. It was directed particularly against heretical writings and has never had and never *can* have any legal status in this country.

The censorship which the critics of all who are

pleading and working for clean literature have in mind is, of course, that which was made an instrument of oppression under the despotic English monarchs. That is the only kind that ever touched America and the odium of tyranny still clings to the word. That is why it was seized upon to create prejudice against the movement for clean literature. The object of censorship was political and particularly directed to bolster up, and perpetuate the royal prerogative. Obscenity was rampant under censorship but free political discussion was throttled. As British liberty grew in England censorship weakened and died, but the laws against obscene publications grew apace in stringency and effectiveness until, in the liberal England of to-day, obscene prints are more effectively restrained than they are in America although there, too, the barriers against them have partially broken down since the war.

Indeed some of our foulest books are written by English authors for publication and circulation in America. For printing extracts from one of them which has been among the best sellers in this country and freely advertised by leading newspapers and periodicals, the publisher of an English paper was convicted and sentenced to a four-months' term of imprisonment. In America an open market is found for the printed filth and depravity of continental Europe also. Our country has become the literary cesspool of the world.

No guarantee of a free press found place in the English Bill of Rights. Censorship died a natural death by the refusal of Parliament, in 1695, to re-enact the Censorship Act, when it expired by limitation. With passing of time, however, a free press came to be recognized as a popular right as safely secured as that of free speech, which was included in the original Bill of Rights.

Censorship of obscenity? It was never known in any country under Anglo-Saxon institutions. As Macauley remarks in his *History of England:*

"In truth the censorship had scarcely put any restraint on licentiousness or profaneness. The Paradise Lost had narrowly escaped mutilation: for the Paradise Lost was the work of a man whose politics were hateful to the ruling powers. But Etherege's She Would if She Could, Wycherley's Country Wife, Dryden's Translation from the Fourth Book of Lucretius, obtained the Imprimatur without difficulty; for Dryden, Etherege and Wycherley were courtiers. From the day on which the emancipation of our literature was accomplished the purification of our literature began."

The talk of censorship of obscenity is unintelligent when not baldly dishonest. One newspaper which had been loudest in denouncing as censorship the proposed amendment of the anti-obscenity statute of New York evidently discovered in some manner the grotesque absurdity of its charge.

But did the editor recant, did he apologize for his abusive editorials? He did *not*. A newspaper must maintain its fiction of infallibility though the heavens fall. This editor simply switched and declared that the censorship he meant was censorship by jury and shudderingly portrayed the evils that would come upon the publishing interests under the "tyranny of juries" if the anti-obscenity laws should be enforced.

Censorship by jury! Yes, indeed; that is the censorship we advocate. We have it now—in the letter of the law. We have had it as colonies and as states from the beginning. Every state has it and so has the Federal Government in common with all countries ruled and living under Anglo-Saxon institutions.

One of our most cherished possessions is a man's right to trial by jury before he may be convicted of crime. A jury of his peers must unanimously agree upon the guilt of every defendant before he may be fined or deprived of his liberty or his life. The jury, the constitutional triers of fact with power over life and death, personal liberty and property rights—that is the tribunal before which must be hailed the perpetrator of published obscenity. For obscenity is a crime.

In order to leave no doubt respecting the lack of constitutional protection against obscene prints, here is an extract from a decision of the Supreme Court of the United States in the case of Robert-

son v. Baldwin decided in 1896 wherein the Court declared:

"The law is perfectly well settled that the first ten amendments to the Constitution, [containing guaranties of free speech and a free press] commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, *the freedom of speech and of the press does not permit the publication of libels, blasphemous and indecent articles, or other publications injurious to public morals and private reputation.*"

Right since the settlement of Jamestown and Plymouth American standards of morality have been higher than anywhere else on earth. Down to the period of the World War American writers have always lived up to those standards and given us a literature which was clean and ennobling. Today, certain American book dealers are engaged in scavenging the garbage of European literature and palming the vile stuff off on the American public as foreign masterpieces. The United States Postmaster-General calls attention to the menace of this

evil in a recent report, and endorses the international conference of 1923 to devise ways and means of suppressing the traffic.

Purveyors of indecency appear to imagine that printed dirt enjoys special privileges beyond that of spoken language. They are obsessed with the idea that the Constitution gives them the right to publish and circulate anything they please. Yet the Constitution guarantees exactly the same measure of freedom to speak as to print.

What would you think of a man who told a distinctly shady story in your own family circle? Perhaps it would be more pertinent to ask what would happen to the teller? If he were not thrown out, he would be dragged out—by a policeman. When he puts his vile story into print and sends it into your home, for young and old to read, is his action any the less reprehensible? Yet the traffickers in obscenity claim the right to do just that, and they are doing it, in flood volume. The Supreme Court of the United States has decided specifically that written dirt is not protected by the Constitution any more than spoken dirt. The Court of Appeals has construed the New York Constitution exactly to the same effect. Our literature must be cleansed of it. Obscene language undergoes no change on the printing press. There is no alchemy in printer's ink to transmute indecency into decency.

Defamatory libel has always been treated as a

crime. It is an attack upon the individual. So printed obscenity was recognized as a crime under the common law because it was held to be an attack upon society and therefore "obscene libel." Either kind of libel may consist of one or many words. A word or words constitute criminal libel when they are defamatory. Any printed matter is obscene libel only when its tendency "is to deprave or corrupt those whose minds are open to such immoral influences, and who might come into contact with it."

Every individual may refuse to read anything degrading. The head of every home has the right to determine for itself what reading matter is unfit for the family. So every organized community has a like right to punish the publisher of such prints as offend the average moral sense of its members. No outside authority, no literary or art critic, no author or publisher, however eminent, has the right to determine whether a picture or publication is fit or unfit for general circulation in the community. The people and the people alone, have the right under our Anglo-Saxon institutions thus to safeguard the morals of the present and rising generations.

Who is to determine whether a given publication offends the moral sense of the community? That question has been answered in a thousand court decisions. The statutes themselves answer it by declaring the distribution of printed obscenity a

crime, for that necessarily implies that a jury drawn from the community concerned must decide the question.

This talk of suppressing a publication for a single word, a phrase or a sentence is as silly as it is dishonest. How could any one go about the suppressing of Shakespeare for example under our laws? Some twenty years ago a Boston lawyer declared with a great blare of trumpets that he was going to suppress the Bible on the ground that it contained obscene language, in contravention of the law of Massachusetts. He got just as far as the anteroom of the district attorney's office and was there ignominiously squelched amid the derisive laughter of Boston town.

Before the vexatious and dangerous process of suppressing any publication begins, some one must accuse his neighbour of a crime. Before he does that the law says that he must be pretty sure of his ground. If he does it without reasonable and probable cause, and the defendant is discharged at any stage of the case, the accuser may be compelled to pay damages to the accused through a suit for malicious prosecution. So serious does the law regard an unwarranted criminal complaint that it gives to the accused not merely compensatory damages for his arrest, detention, injury to his reputation, his humiliation, his mental and physical suffering and the expense of defending himself, but also permits a further sum to be added

to the verdict as smart money, a fine, a punishment, a warning to the complainant not again to commit the offense of making a false charge against his neighbour.

In any event a conviction must be obtained in the first instance under the stringent safeguards thrown around every defendant in the criminal courts under American law. The accused is entitled to a trial by jury and twelve men, carefully selected in open court for their impartiality, must agree upon the guilt of the defendant. A jury of his peers, the constitutional triers of fact, in whom is lodged the power over life and death and over all the personal and property rights of every one of us—the jury, the greatest of all our safeguards of life, liberty and property under our democracy, must unanimously agree that the accused is guilty before he may be fined or imprisoned. Thus and thus only may any purveyor of obscenity be punished.

Then there is the judge, always ignored by our critics. There can be no jury trial without a judge to interpret and fit the law to the peculiar circumstances of every case, to see that no injustice is done and that reason, common sense and utter fairness govern every case at every stage. Who is there outside of a lunatic asylum senseless enough to make a criminal charge against his neighbour for selling the Bible, a copy of Shakespeare or of any recognized classic?

The moral sentiment which forced the obscenity laws upon the statute books is not dead though blanketed for the time being by the publishing interests which are fighting to conserve their profits from an unholy traffic. We have always fondly thought of our country as superior in moral standards to all others. Certainly it used to be. The men and women who laid its foundations cherished high moral ideals and incorporated them into the fabric of American life. To them home and family were sacred words connoting a sanctuary of morality and a cradle of private virtue and civic rectitude. Through adherence to these moral standards America has grown to its present proud place among the great nations of the earth. We must not abandon them now. They have been lowered by the effect of the World War, and it is our burden, our duty, to elevate them to their old-time place and leave behind us a generation which will maintain them there.

III

LIBERTY OF THE PRESS

THE liberty of the press can neither be destroyed nor limited. But what is the kind of "free press" which is constitutionally guaranteed? Not licentiousness of the press, not the right to injure your neighbour or society at large. Every one is responsible for what he publishes and if he injures the reputation of an individual member of society through libel he may be punished as a criminal. So if, by publishing obscene matter tending to corrupt public morals, particularly the morals of the young, he attacks society itself, he may be punished likewise. Indeed published obscenity is obscene libel, so called in the old common law indictments for the crime.

America just now is flooded with books, magazines, pamphlets, pictures and fugitive prints which not merely offend decency but actually teach revolting forms of immorality to American children. The centre of distribution is in the city of New York whence is disseminated eighty-five per cent. of all this vile stuff which is circulated throughout the entire country. Some states—Massachusetts for example—enforce their anti-obscenity statutes

effectively. Yet even these states are not fully protected so long as the principal source of supply in New York is permitted to pour forth its huge volume of immorality unhindered.

The men who have prostituted a noble business to the dissemination of printed obscenity and the inoculation of the minds of American youth with the germs of moral depravity have arrogantly challenged the moral sentiment of the country. The people should take up the challenge and hurl back in their teeth the counter challenge of war to the death. Many publishers have nothing to fear. They teach morality, not immorality. Why they should make common cause with the purveyors of literary garbage is beyond comprehension.

These offenders against public morality pretend to believe that the protestants against obscenity aim to create a censorship. If they really believe that it is through failure to inform themselves. For all that is sought is enforcement and restoration of the old laws to their former status as the safeguard of our homes and firesides from desecration and pollution. If that is censorship we have had it always in this country but no one ever found it out. No censor, board of review or other authority, to pass upon manuscripts before publication is proposed. On the contrary, the old American principle of protecting every one in his right to publish his sentiments on all subjects is left untouched. But the companion obligation that every

one must answer to the law for the abuse of that right is also retained. That safeguard of political and religious liberty was never intended to give the right to any one to introduce into our families printed obscenity which, if spoken there, would bring bodily chastisement upon the speaker. Yet that is the right now claimed by the publishers.

If they persist in their blind opposition to every effort to correct intolerable conditions they will bring down upon the publishing business a censorship indeed. As the history of every similar moral movement shows, the demand for more and more drastic treatment of the existing evil grows and grows until it passes the bounds of toleration. Witness the rise, progress and victory of the temperance movement which culminated at last in the Eighteenth Amendment and the Volstead Act. There is no limit to the power of government to search out crime and punish criminals, and published obscenity is a crime and nothing else.

Censorship of obscenity? As well talk of censorship of theft, arson or murder. What do our critics mean by censorship? They probably neither know nor care. If it means anything intelligible, it must be the censorship which under the English monarchs before 1695 required licensing of the press and governmental approval of manuscripts before printing. In the early days of the American colonies the English king tried to enforce a like censorship of the press through the royal gover-

nors. Benjamin Franklin's brother was imprisoned for publishing a political article. It was against that sort of censorship the provisions guaranteeing a free press were aimed when introduced into the constitutions of the United States and the several states thereof.

IV

THE BIBLE, SHAKESPEARE AND OTHER CLASSICS

NO more foolish charge has been made against anti-obscenity laws than that which asserts that they open the way for the suppression of the Bible, Shakespeare and the other classics. In the first place, these informed critics overlook the fact that to constitute a trial-court there must be a judge to interpret and apply the law, to give to it a rational meaning, and, if there be a jury, to prevent any unjust or unintelligent verdict being rendered. And the courts have expressly decided that the obscenity law does not apply to the works above mentioned.

In the case of St. Hubert Guild against Quinn, decided in 1909 by the Appellate Term of the Supreme Court of New York the question was presented whether the obscenity statute applied to certain standard works and the court unanimously declared:

"The rule against the sale of immoral publications cannot be invoked against those works which have been generally recognized as literary classics. As was well said by Mr. Justice O'Brien in the Worthington Co. case (24 L. R. A.) 'What has become standard literature of the English language—has been

wrought into the very structure of our splendid English literature—is not to be pronounced at this late day unfit for publication or circulation and stamped with judicial disapprobation as hurtful to the community.'"

The Federal courts have ruled the same way. In the case of United States against Harmon the same objection was raised thirty-five years ago and the court disposed of it in this language:

"Counsel for the defendant, in support of the demurrer, have made an ingenious argument, and one showing much research in the field of general literature. They insist that if an article in a paper or other publication comes within the meaning of the law, then by the same reasoning a chapter or sentence of a book which is obscene would bring under the ban of the law the whole book, and would exclude it from the mails. As a result, not only medical works, but the writings of such authors as Swift, Pope, Fielding, Shakespeare, and many others, and even the Bible itself would be denied the privileges of the United States mails. Undoubtedly there are parts of the writings of said authors, and many others equally noted, which are open to the charge of obscenity and lewdness, but any one objecting to such works being carried through the mails would be laughed at for his prudery."

To the like effect is the famous English case of Queen v. Hecklin, printed on another page, which is an accepted authority throughout the Anglo-Saxon world.

The law is the essence of common sense, fairness and intelligence. Every statute is presumed to embody them and no construction inconsistent with them or application at variance with them will be sanctioned by judicial authority. The intent of the anti-obscenity laws is to suppress current obscenity in print and picture.

No express exception is made in favour of any class of publications as a rule because of the danger of leaving gaps in the law through which immoral writings might enter. Since the war a constant stream of vile books, translated into English from Italian, French, German, Russian and other European languages—some even from the Latin of degenerate Rome—has been flowing from the American press. These works are " touted " by hired " literary critics " as ancient classics although they have nothing which should be regarded as constituting a claim to this title, and nothing to recommend them to public notice except their shocking filth.

Even medical books are not specifically excepted from the operation of the statutes usually although the courts have always held such works, if standard, outside the purview of the prohibitions of the law. The ease with which pseudo medical writings whose mission is to destroy soul and body instead of to cure and assuage bodily ills, could get through the law under such an express exception contained in a statute is obvious. Indeed just such writings

have frequently been the subject of prosecutions. Notwithstanding the multitude of statutes condemning the general circulation of obscene prints and pictures as a crime, no prosecution has ever been seriously attempted against any work of genuine merit in any field under American law.

Massachusetts furnishes a case in point. The anti-obscenity law of that state expressly prohibits publications "containing obscene, indecent or impure language." That law is admirably enforced and although any obscene part of the publication is thus made the basis of criminal prosecution no attack has ever been made in that state upon any worth-while book. Thirteen other states have incorporated provisions into their respective anti-obscenity laws containing language similar to that quoted from the Massachusetts statute, thus making a publication which contains anything obscene, no matter how small a part of the entire work the obscenity may form, a warrant for criminal proceedings against the publisher. Massachusetts, the literary queen of America, affords present proof of how admirably an anti-obscenity law may be made to work when it is intelligently construed and honestly enforced.

To speak of suppressing a publication for obscenity is misleading. The prosecution is directed against the person who sells or circulates an obscene publication, not against the publication. Never is a publication wholly obscene. It only

contains obscene matter. When convicted for selling the book, the publisher or seller is still free to eliminate the obscenity and put the publication on the market with impunity. It is only the obscenity in the book which is suppressed and the publisher is punished for putting it in the book.

This nation was planted in the fertile soil of sound morality. We have grown great and our democracy has triumphed through the sterling virtues of our citizenry. The American home has ever been the fountainhead of morality, the sanctuary of youthful innocence. We must guard it from contamination and corruption if this nation of ours is to fulfill its divine mission of showing the way to other nations toward a higher and nobler national life.

American literature formerly was wholesome, ennobling, inspiring. We have fondly looked upon our beloved country as morally superior to European countries. It has now become the cesspool into which drains the foul sewage of degenerate foreign writings and pictures. We are becoming a byword in the mouth of all the world. What matters our great wealth and our material progress if our spiritual life is contaminated and debauched? What judgment would George Washington pronounce upon us for tolerating such abhorrent conditions? Let Americans answer those questions in the light of these significant words from the *Farewell Address:*

"Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labour to subvert these great pillars of human happiness—these firmest props of the duties of men and citizens."

Our country is sound at heart. If the people realized how bad conditions really are, they would vote five to one for their abolition. But they do not know and the organs of public intelligence keep them in ignorance. They are unorganized, uninformed and inarticulate. When they do find out, they will be stirred by a mighty wrath and demand to know from their public servants—legislative, judicial and executive—why they have so long permitted the traffickers in obscenity to debauch the morals and pollute the souls of our children with impunity.

As we love our country we must put down this monstrous evil and punish its promoters. They have clothed fair Columbia in the scarlet trappings of the harlot. We must replace that shameful raiment with the white robes of purity, which are hers by right, to typify before all the world the cleanliness of the lives and the lofty aspirations of the great mass of the American people.

V

AUTHORS' CONDEMNATION

NO extended dissertation on the vicious influence of current " literature " will be attempted. Its vileness is generally recognized and deplored. How bad conditions are let distinguished writers tell who surely cannot be accused of " literary ignorance," intolerance or fanaticism.

There is, for instance, Edwin Markham, who wrote on the decadent tendency of present-day fiction in *Current History* for August, 1923. Of the " free-speaking novels pouring from the press," he says:

" Even a brief inspection of this fiction shows it to be a filthy current of sex-obscession, tainted with dregs of sex-perversion—a current that spreads pestilence wherever its putrid waters flow."

Further on he writes:

" What these new writers call ' love ' is the brute attraction of the herd or the easy promiscuity of the harem. All that religion and the higher poetry have laboured for since the caveman is by them obliterated. The interest they show in sex is largely pathological; they see it chiefly in its diseased and erotic manifestations, never as the sacred mystery of existence.

"These writers hand out their stories of savage abandonment to pleasure as 'advanced' fiction. Yet they are taking their motives only from the sex-excesses in the days of degenerate Rome. We sense in them all the atmosphere that surrounded Messalina in her intrigues and Heliogabalus in his debaucheries. London was never bestial like Rome; nevertheless, some passages in Elizabethan literature are impossible to our modern ears."

Mr. Markham discusses in detail the plots of several typical novels. Of one book against which all the remedies of the New York law have been evoked in vain efforts to suppress it and which is still in free circulation under express judicial approval and laudation, he says:

"The brains of Bedlam could not conceive a more revolting story; and the fact that it has for the reader a certain glint of style makes one think only of a man who is forced to hold his nose in order that he may admire the iridescence of a decomposing fish.

"America is not guiltless of shame along this sex-range—novels, photographic and phonographic, novels that reek with animalism and bawdy sentiment."

Mr. Markham goes on:

"Why this recrudescence of sex-excess when we have so much progress in other directions? The aged poor—once exposed to die on the roadside—now make themselves comfortable in old people's homes. Ship-scuttling pirates have now left the seas and gone behind the counters as polite profiteers. Polygamy

is now left to the 'unspeakable Turk' and even he is beginning to renounce this chanticleer superfluity of wives. New ideas are growing; and yet some of our American fictionists are defying the spirit of the times and are going back to the discarded vices, obscenities and degeneracies of the past."

The next witness is Hamlin Garland, a writer of the first rank. In the New York *Times Book Review* of December 23, 1923, writing on "Current Fiction Heroes," he refers to loudly-dressed young girls seen on Fifth Avenue and asks: "On what model do they form their manners? What kind of mothers will they make?" To these questions Mr. Garland finds the answer in the *Theatre Magazine,* and quotes from it as follows:

"'The drama to-day is a reflection of the conditions of the world as left by the aftermath of the great war. . . . The idle, profiteering, thoughtless public wanted to be amused . . . the playwright who could attract and entertain the mob became the lion of the hour. He gave them plays in which prostitutes were the heroines. . . . The red-lamp district was transferred from the "Tenderloin" to the stage. . . .

"'In better, saner times the red light symbolized danger—a leprous spot to avoid. . . . In America we are more progressive. There are no red lights in our side streets, but they burn—even more brightly—on our stage! The prostitute—that is the character our rapid-fire, up-to-date dramatist prefers to exploit for the fattening of his bank account. The

youth just out of college, the virgin of blushing sixteen, is shown the life of the harlot in all its unsavoury, hideous details. . . .

" 'A certain class of women playgoers like to see the prostitute on the stage. Perhaps they see in the hectic heroine what they might have been in other circumstances. *Weak, unmoral, barren by principle, they let their empty-headed daughters imitate the harlot in dress and manner,* and their sons go to ruin for her.'

" The italics are mine, but all the editor says of the abortive heroines upon the stage can be applied to present-day fiction. The woman libertine is in process of glorification in book as well as in play. . . . That such plays, such stories, are profoundly affecting the manners of our boys and girls cannot be disputed and New York City is the chief centre of this baleful influence. The scenes of these stories, these pictures, these plays, are usually laid in the resorts of New York City. Managers are not friendly to plots laid in other, and especially inland, cities and towns, and magazine editors more and more demand similar themes and similar heroines. . . . Everywhere I go I find the victrola belching the brazen clang of jazz, screaming the suggestive songs of the music hall and bawling the off-colour jests of the cabaret. The 'popular' magazine, with its flashy illustrations, . . . is on every news stand, while the moving picture house offers the villager and the farmboy inspiring glimpses of the doings of New York's underworld. It is in this way that certain agencies of our great metropolis exploit and corrupt the small town. . . .

" I resent the implication of such New York plays

and New York pictures. Their characters are not American in the deeper meaning of the word. The men and women who made America, who cleared the forests, founded cities and established schools did not dance suggestive dances to the sound of the jazz band. They would look with amazement and disgust on the heroes and heroines of the present-day sensational plays and books. Such literature does not make for a vigorous and forward looking America. . . .

"In expressing my resentment, my opposition to the growing power of these corrupting agencies which have their centres in New York City, I believe I am expressing the feelings of many of her citizens. It may be that this flood of perverting literature and picture drama is only a spring freshet, but it is something to take account of and to abate if possible."

These extracts from Hamlin Garland's article constitute only part of his terrible indictment of present-day pictures, plays and stories.

Another witness is Mr. George Washington Ochs-Oakes, editor of *Current History Magazine,* published by the New York *Times.* In an address delivered before the Women's Christian Temperance Union on May 28, 1923, he speaks of "the forces now imperiling through impure books our moral values—yea, civilization itself," and continues:

"I gladly enter the lists to aid in arousing sentiment and urging that gaps in the law be closed so

that creators and purveyors of unclean writings may not escape just retribution.

"It is not a pleasant task to grapple this evil. Every one who undertakes it becomes a butt for ridicule, a target for the jeers, jibes and lampoons of columnists, critics, authors—and alas! editors also. When the hearing on the Clean Books Bill recently was held at Albany the publishers who have been issuing objectionable matter, authors who have been writing it, magazines who have been circulating salacious stories, editors of newspapers which thrive by sensational fiction, united in the effort to throttle the measure. On the other hand, representatives of numerous religious bodies, distinguished welfare workers, men and women representing institutions, associations and movements for the moral health and protection of our people—not fanatics or extremists, but sane, upright men and women who had no end to subserve other than the protection of the plastic mind of youth from the influence of immoral books—strove valiantly for its enactment. . . .

"A law which sanctions the printing and sale of some of the prurient publications now debauching our youth traduces our vaunted civilization, and the blazing wrath of aroused public opinion from a people befouled and insulted will yet compel the authorities to dam up the polluted streams of abomination. . . .

"The most fallacious argument against more restrictive laws is the contention that the remedy should exist in the home; that the children should be taught that they will shrink from unclean books; that youth should have such moral stern fibre that it will be unaffected by lascivious appeal. This is a palpable quibble, irrational and illogical. As well repeal all

criminal statutes and put full responsibility for youthful transgressions up to the parents; pardon the thief, pickpocket, cadet and young bandit because of lack of moral strength to resist evil; absolve the tempters, the Fagins and teachers of crime who snare boys and girls because their home training should have taught them resistance to such lures; let the betrayer go scot free, because the girl was badly raised and was too susceptible. Even in the days of the saloon, barkeepers were punished for selling to drunkards or minors without clemency because the drunkard was urgent or the minor badly brought up. Should we be more considerate of, or more compassionate toward, the author or publisher who inflames the passions and arouses the baser qualities of boys and girls with lascivious books, than to the saloon-keeper who entices them to intemperance, or maddens them with vile whiskey or other poisonous decoctions?

"If we did not have rigid laws to suppress barrooms, those sinks of iniquity would flourish at every street corner; if we had loose laws to suppress narcotics, the victims of degenerating, habit-forming drugs would multiply a thousand-fold; if we had weak laws to suppress gambling, those dens of vice would flaunt their lure in every city block.

"What has been the result of the surrender by our courts to the pleas of the unrestrictionists?"

Mr. Oakes names four books as typical of a class he has in mind. Speaking of them he continues:

"[They] are now on sale everywhere with the law's sanction. These books are erotic, perverted,

and blasphemous; within the reach of young or old of plastic mind, they are a menace, foul, pernicious, and debasing."

It will be noted that Mr. Oakes does not attempt any outline of these foul stories. Decency forbade his going further than denouncing them as "erotic, perverted, and blasphemous," and as "a menace, foul, pernicious, and debasing." Right here is found our chief handicap in discussing these unspeakable books, magazines, pamphlets, and pictures.

Few normal-minded adults have read these publications or could be induced to read them. Yet without the actual reading they can form no adequate conception of their shocking contents. No newspaper would print the viler portions of them in its news columns, nor could money buy space even in its advertising pages for them. Yet the newspaper's paid literary critics extol them in flattering phrase, while money flows into the coffers of its business office for advertising them. Moreover, one cannot mention the titles of these publications without advertising them. One cannot put the bad extracts from them into the mails without risking fine and imprisonment under the Federal statutes.

Mr. Oakes next passes to another class of pernicious books more subtly harmful, although lacking the grossness of the others. They are among

the best sellers. One of them Mr. Oakes thus epitomizes:

"Every page reeks with sex laxity and immorality; the girls begin their sex perverseness at fifteen; the looseness exists in mother and daughters; young men and women visit a natatorium and indiscriminately bathe together, entirely nude; sisters, married and single, freely discuss with one another their loose life; the youngest member of the family, a girl in her teens, lives a life of sin in her own home with a middle-aged married guest of the household, and continues her amours indiscriminately, finally to be rewarded for her awful career by entering into a blissful married state with her first elderly paramour. I apologize for giving these offensive details, though I have merely glossed over the dreadful story; yet this frightful tale ran serially in a woman's magazine claiming nearly two million circulation, and is now the second best seller among the latest fiction."

Because of the high standing of Mr. Oakes in the world of letters and his peculiar qualifications to speak with authority on this subject, and also because what he says is so pertinent, one cannot let him go without further quotation. He continues:

"I have small patience with the supercilious class of writers, editors, critics and columnists, especially some of the latter. With rare exceptions they are conceited, over-indulged coxcombs of literature, suffering from delusions of greatness and exaggerated

ego, borne by the tide of their own verbal exuberance, ready to sacrifice a reputation for a wheeze or blast a good name for a quip. This type of cynic pitilessly stabs with mordant pen and cruel jest any one who even timorously expresses a judgment which does not square with his dogmatic views. Particularly is he sardonic if such opinion is a protest against the prevailing laxity in manners and customs; if it expresses itself in dissent against the present extreme style of girls' habiliments, or in remonstrance against immodest flapperism; if it demands observance of temperance, reverence for religion, obedience to law and courts, or if it seeks intelligent censorship of lascivious plays and obscene books.

"We enact laws to suppress narcotics, to protect our youth from habit-forming drugs; we pass statutes to guard our stomachs from poisonous foods; we have legislation to protect our eyes from vulgar sights, our ears from foul noises, our bodies from insufficient heat, our noses from offensive smells. The senses of sight, taste, feeling, hearing, and smell are cared for; but more sensitive, more impressionable than the entire five physical faculties is the mysterious matrix of the soul, the subliminal consciousness which dwells in the human form and indelibly records all its physical reactions; that imperishable, impalpable essence which comes direct from God to be reabsorbed after death into immortality! Shall it be neglected, forsooth, because certain erotic writers must find markets for their foul productions? God forbid!"

One more extract from this distinguished man of letters and we reluctantly leave him. In an address

at the dinner of the Society of Arts and Sciences on November 6, 1924, Mr. Oakes said:

"The proposition to censor works of the imagination, whether books, pictures, plays or movies, raises invariably a storm of dissent among the few sincere but misguided, and the many see their pocketbooks affected; they passionately protest that it implies a suppression of 'Truth,' the 'hamstringing' of art, a restraint of 'free expression.'

"But: What is 'Art'? What is 'Truth'? What is 'Free Expression'?

"Is 'Art' a creation to arouse lustful emotions; is 'Truth' the expression of thoughts to stimulate vicious impulses; is 'Free Expression' a privilege to diffuse foul suggestions?

"Who is to determine whether these sinister seeds are sown? Shall it be he or she whose moral reactions are so blunted as to be either contemptuous of or insensible to the evils that lurk behind their work? Or shall the decision rest with an unbiased judicial body of experts, chosen by legal authority—men and women—who have not the perverted artistic temperament, also who are free from the enticements of swollen box office receipts? It is a sad commentary on the depravity of human nature that the more salacious the book the more risqué the play, the more suggestive the work of art, the wider the appeal, the greater the sale, the bigger the audiences. Publishers and producers are keenly aware of this! hence anything that may restrain unfettered latitude in appealing to this human frailty raises strong objections.

"But does true art suffer by reasonable restraint?

Shall it be contended that art finds real expression only in libidinous utterance? Will the emotions evoked by imaginative work, whether of author, dramatist, painter or sculptor, evaporate unless they are inflamed by lustful appeal? To admit this is to confess that idealism, purity, ethics and morals have vanished and that our vaunted civilization is a delusion."

A multitude of witnesses might be cited but since their testimony would be merely cumulative only one more is quoted, Hendrik Willem van Loon, who writing in *The Commonweal* of December 31, 1924, recounts his efforts to induce an editor of a famous newspaper to enter the lists against pornographic prints.

"Buckle on your most shining armour and follow me to the nearest news stand," he exhorted. "There you will find, available for common use (and at small cost) the foulest collection of smut, dirt and plain pornography ever offered to an unsuspecting public in the name of Literature. Smite these corrupters of our children's morals with the glorious wrath of your outraged decency and be forever praised."

But this man had no time for a trifling matter of that kind, so Mr. van Loon betook himself to the editor of a self-righteous magazine and assailed his ears as follows:

"Send out your clever sleuths to the nearest newspaper stand. He will there discover a collection of

sluttish, abominable and saprogenous literature in such quantities that it can pollute an entire continent. Denounce the greedy scoundrels who print it, and gain our everlasting gratitude."

This editor was also deaf to his appeal so Mr. van Loon goes on:

"But, to misquote the eloquent Doctor Martinus—'I shall have my say if the world were as full of indifferent editors as New York is full of taxis.' And for lack of a convenient church door, I shall hammer my theses to the hospitable wall of *The Commonweal* and I shall proclaim here and now, and as loudly as I can, that our country is being overrun with and by a putrid stream of the most despicable, the most iniquitous, and on the whole the most dangerous form of a degraded variety of literature; that this stuff is being publicly sold and publicly sent through the mails; and that so far no authority, public or otherwise, seems to be willing or able to stop the dissemination of this literary garbage. So that is that. . . .

"Furthermore, this degraded stuff is not a monopoly of the metropolis. It is sold just as openly in Yellow Springs, Ohio, as in Homer, N. Y., or any other hamlet of our fair land. It is ubiquitous. It is printed by the ton and sold by the bale. It has millions of dollars behind it. And it is of recent origin. And worst of all, they commit their crime in the name of Health, of Morals, of the Purity of the Home, and they cover their tracks so cleverly that the ordinary moron who is a post-office inspector or a professional censor shouts—'Why, this is fine stuff.

It reads like *The Sheik,* the book that had such beautiful passages about Arabian sunsets,' and takes it home to his little girl who is studying shorthand and is making ready for a career on the grand opera stage."

Mr. van Loon closes his article with this telling paragraph:

"I repeat that if the reader thinks that I am making a mountain out of a molehill, the true test lies around the nearest corner. Let him or her put on his or her galoshes and inspect a news stand, or the magazine section of a department store. He will there find a collection of 'revelations,' 'dreams,' 'romances' and 'confessions' which in their true nature are nothing but thinly veiled pornography. If he or she has a spare quarter, I shall ask him or her to do me a favour. Let him buy a copy. Let him take it home and read it. Then after half an hour's gargling with strong disinfectants, I want him or her to light a cigarette and ponder upon the strange duality of our official world, which makes a cannibal feast of a book when it contains the word 'belly,' and which permits the publication and dissemination of whole wagon loads of stories which Louis XV would have ordered burned by the public hangman and which would have made Casanova blush with shame."

LIBRARY
13924
MANCHESTER COLLEGE

VI

NEW YORK'S PROBLEM

BECAUSE New York City is the distributing centre for from eighty to eighty-five per cent. of all the obscene publications, pictures and objects which circulate throughout the United States, the deplorable conditions found there are deserving of special consideration for they vitally concern every state in the Union.

In New York State the efforts to suppress obscenity has focussed upon an attempt to amend its emasculated anti-obscenity statute. These efforts have met with abuse and opposition from publishing interests, including secular newspapers and magazines. The publishers of dailies and other periodicals have much in common with the theatrical interests, and with some book publishers. The latter, for example, profit by selling books and exhibiting plays and films; the former profit by advertising these. Quite aside from such a consideration, however, the law makes it exactly as much a crime to advertise a bad book as to sell it. Every time a newspaper reaps a harvest from advertising an unlawful book, it is, by terms of the law, committing a misdemeanour.

Then, too, the influence of the metropolitan

newspapers extends to the various press associations and syndicates having to do with gathering and disseminating the news and they in turn wield a dominant influence over the little dailies and weeklies published in the lesser cities and the still smaller villages through control of their national advertising. Thus far with few exceptions all these interests have presented a united front against any action by the legislature to cleanse current literature of its abounding vileness.

Before this opposition the legislators quail. As yet, due to the misrepresentations and abuse spread broadcast over the whole state and country by the organs of public intelligence, the mass of citizens have failed to bring pressure to bear upon their legislative representatives. The average legislator is largely an opportunist. He is not going to antagonize the newspapers regardless of the merits of the controversy until his own constituents demand it. Hence his docile obedience to the dictation of newspaperdom.

Yet there is no doubt that if the constituents of the Members of the Assembly and of the State Senators who now oppose the suppression of published obscenity at the State Capitol understood the controversy they would promptly call their representatives to account for their action and compel them to stand for the decency and morality which those constituents themselves practice and teach to their children.

The great object now is to educate public sentiment and focus it upon the legislature. The situation is that while the bulk of the people recognize present conditions to be bad, yet they think the proposed legislation is objectionable in form and tyrannical in purpose. Their family newspapers have told them so and they have no other medium of information.

That delusion must be dissipated. Public sentiment must be concentrated upon a definite objective. That should be the enactment of the Clean Books Bill or some other measure embodying the same purpose. All effort must be directed to that end and, in accomplishing its enactment, the more important end will have been attained. That is that the same public sentiment which has been so aroused and concentrated as to force the passage of the amendments necessary to make the anti-obscenity law effective, will then compel the law's enforcement. If we had to-day the New York statute amended as proposed by the Clean Books Bill, its efficient enforcement would be far from assured in the present uninformed and therefore decidedly apathetic condition of the public mind in the state of New York.

A knowledge of the purposes of the Clean Books League is requisite to an understanding of the fight in New York State for cleaner literature. Its adversaries represent it as proposing a new and untried remedy for suppressing published obscenity.

It would be more charitable to attribute their attitude to ignorance than dishonesty.

The problem it is trying to solve is one that civilization has been grappling with for centuries. The accumulated wisdom and experience of the ages have been able to devise but one effective method of dealing with obscene publications and that is to stamp them as criminal and punish distributors of them like other criminals.

The Clean Books League is following a well-beaten path. The old New York statute passed in 1868 was merely a codification of the existing common law of England and of the colony and state of New York down to that time. In form it is an excellent law as it stands to-day in Section 1141 of the Penal Law of the state.

Yet a deluge of obscene prints and pictures overwhelms the country. How bad conditions have become is told by distinguished writers in the preceding pages. Those conditions are new. Before the World War the good old law as construed by the New York Court of Appeals protected the homes and families of the state from contamination by pictures and publications.

The Clean Books League diligently sought for the cause of the change and found it in the emasculation of the old anti-obscenity statute through the interpretation placed upon it by the lower courts. Upon examination of the decisions in other jurisdictions, Federal and State, where laws similar

to the New York Statute had been construed by the courts, it learned that the interpretation as now established was an anomaly. Everywhere else the anti-obscenity laws containing identical language were enforced according to their clear intent and meaning. The remedy was obvious—simply to amend the ancient law so as to restore the old interpretation of it by the Court of Appeals and to introduce into it the common sense procedure of the Federal Courts under whose decisions the statutes of the United States prohibiting the deposit of obscene publications in the mails, excluding them from interstate commerce and barring them from importation, have been effectively enforced in all cases brought before the courts.

There is nothing novel or revolutionary about the Clean Books League program. If the law is amended as it proposes, obscenity may be suppressed. Under existing law as construed by the lower courts, criminal obscenity will continue rampant.

One should always bear in mind that we are dealing with a hoary, loathsome crime—criminal obscenity. The literature of the subject is found only in the records of the criminal courts. Never before was it necessary to conduct a campaign to procure legislation to suppress the crime of putting into general circulation prints or pictures tending to corrupt the morals of youth. Laws to stop that were passed as a matter of course in former years

just as were passed laws against brothels, narcotic drugs, theft or other crimes. The old law of 1868 was amended six different times, always in the direction of greater stringency. There is no record of any opposition to these acts of the legislature.

Why the determined opposition to the League's simple, practical proposal? The answer is as plain as day. Since the slump in public morals consequent on the World War writers and publishers have tapped a new source of profit. Before that there was no legitimate market for printed obscenity. It could not be sold under our law as construed by the Court of Appeals away back in 1884. Now the sale of—to use the statutory adjectives—obscene, lewd, lascivious, filthy, indecent and disgusting books, pictures and prints of all kinds is legalized by the courts. A large and profitable business in them has been developed. All the opposition comes from the publishing interests and those they control, coerce or mislead.

If one wants to find the influences which dominate the policy of any newspaper, periodical or other publication, let him study its advertising columns. Publishing is a money-making enterprise whose profits come from advertising. Look at the advertisements in any publication and you have the explanation of its editorial policy.

Those who profit directly or indirectly from the revolting business of disseminating morally corrupting publications are enemies of the League.

The Clean Books Bill threatens their profits. Not to them but to the millions of disinterested citizens of the state it makes its plea to help it to dam the putrid streams of indecency which threaten their families and homes, their state and their country.

The foe is fortified by unlimited means and armed with the organs and instrumentalities of public intelligence. To reach the masses of the people in face of a hostile press united against it is no slight undertaking. The difficulties seem insurmountable but the League is determined to surmount them.

VII

SUMMATION OF CONDITIONS

NOT even the most graphic pen could fittingly describe the shockingly obscene prints and pictures which deluge New York City and state. In one way only can an adequate conception of their demoralizing depravity be obtained—that is through seeing and reading them. Extracts of the viler parts may not be presented here because of their shocking indecency. Before the writer now is a sample of this "free expression" from one of the latest books. It is simply horrifying. No newspaper dare print it. Money could not buy space in the advertising columns for it. Yet the book itself probably will be advertised by title in all the newspapers and commended to their readers by the literary reviewers, as have been similar books since the flood of obscene writings began to pour upon the country in the wake of the World War.

Should the Federal authorities bring before the Federal courts any one using the mails for these publications, or sending them across state lines, or importing them, he would promptly find himself behind prison bars. They could not be circulated in any other country in the world whose institu-

tions are of Anglo-Saxon origin. England, Canada, Australia, New Zealand, all suppress them with iron hand. Even in India fine and imprisonment await the publisher who dares to put such prints in circulation. Only the other day the writer saw a court decision of that far-off country upholding a conviction of a distributor of an obscene book which from the description contained in the judicial reports was innocuous compared to some of the books, magazines and fugitive prints which freely circulate in this state, some of them with express judicial sanction. Before the writer lies the statute of Hawaii, our island territory of the mid-Pacific, which prohibits obscene prints and provides punishment for their publication. Porto Rico and the Philippines have similar laws as has of course every state in the Union, except, possibly New Mexico.

Now " free expression " of the putrid thought of the sensualist in print and picture enjoys impunity in the city and state of New York. The libidinous writer has become the teacher of youth who is undoing the work of parents, church and school, all striving to keep the rising generation in the pathway of clean living and moral rectitude. His employer and paymaster is the conscienceless publisher who exploits for unholy profit the libertine's miasmatic emanations.

Yet no state or country has tried harder than New York, through legislative enactment, to suppress published indecency. Its distribution was a

crime in this state during the colonial period under the common law of England. For centuries it had been punished as a crime in that country and about half a century ago the common law was strengthened by a drastic statute of the realm providing for the summary confiscation and destruction of obscene prints wherever found.

The common law was taken over as the law of this state upon our separation from England and was codified by an act of the legislature in 1868. From that date successive legislatures have amended the old act making it stronger and more effective from time to time until it was finally incorporated into the present Penal Law in 1909. The state in 1873 took special pains to provide for the full enforcement of this ancient law when it passed a special act of the legislature incorporating the New York Society for the Suppression of Vice and designating it a state agency for the enforcement of the laws against immoral prints.

The obscenity statute as it now stands is Section 1141 of the Penal Law. It is the most carefully worded and comprehensive of all the statutes designed to prohibit printed obscenity. In brief it declares the distribution or exhibition of any "obscene, lewd, lascivious, filthy, indecent or disgusting" publication, picture or object, or the advertising of them in any manner, a crime with the special penalty of not less than ten days nor more than one year's imprisonment, or a fine of not less

than fifty nor more than one thousand dollars, or both the fine and imprisonment. The anti-obscenity statutes of thirty-three other states have been modeled upon the New York law.

Yet that law is practically dead to-day, killed by judicial decrees of the lower courts before which it has come for interpretation, and that too in face of a unanimous decision of the Court of Appeals which, in 1884 in the case of People v. Muller, construed the law and gave to it and every part of it full force and effect. The death-blow was struck in a decision by the Appellate Division of the First Department. It is obviously impracticable here to go into the legal questions involved. But the plain fact is that the Court of Appeals case of People v. Eastman upon which the majority of the Appellate Division based their opinion reversing a conviction furnished no authority whatever for their destructive decision. Furthermore, that decision in effect squarely reversed the unanimous decision of the Court of Appeals in People v. Muller.

What is to be done about it has been exhaustively studied and considered with exceeding care by the Clean Books League, organized to devise some remedy for the intolerable conditions. It discovered that the accumulated experience and wisdom of the ages have been able to devise no way of successfully combating the evil except by criminal prosecution. That naturally led to the

conclusion that the only remedy for New York's lamentable state was to rebuild the anti-obscenity statute to its old time effectiveness.

It found Federal anti-obscenity statutes were in successful operation all over this country in cases where the Federal courts had jurisdiction. One statute excludes obscene, lewd, lascivious, indecent and filthy prints, pictures and objects from the mails, the others bar them from interstate commerce and from importation under penalties in all cases five times heavier than those imposed by the New York statute. A multitude of decisions have been made by the courts of the United States construing the very words of the New York statute which are found in the corresponding Federal statutes. Those decisions follow the lines of our old Court of Appeals decision in People v. Muller by giving force and effect to every word of the law and thus effectively enforcing it.

The League took the common sense course of undertaking the amendment of the statute in such manner as to overcome the destructive decisions of New York's lower courts and replacing them by the sound principles of construction recognized all over the United States by the Federal courts as well as by the Court of Appeals. That was all the Clean Books League Bill proposed to do and all that it contemplates doing. Give us the construction and procedure of the Federal courts and the foul stream of depravity now debauching the

minds, corrupting the hearts and polluting the souls of the rising generation will be effectively dammed.

There is no doubt what the final outcome will be. The profiteering publishing interests may becloud the issue and postpone the event. But the moral sentiment of the people of New York remains the same as it was in 1868 when the first statute was enacted. When that sentiment has been marshalled, as it shall be, for the cleansing of current literature of its immorality, nothing can stand against it. When the fathers and mothers and relatives of the children are aroused to full comprehension of existing conditions, legislators, aspiring statesmen and the public officials generally who now think they are riding the high waves of popularity when they raise the false cry of censorship in justification of their opposition to our efforts, will discover the gravity of their error to their lasting regret.

The grotesque falsity of that charge of censorship cannot long gain credence in the minds of even the most gullible of our citizens. It is perfectly well understood by every one who has given even casual attention to the question that no censorship of the press can be established in New York State or in the nation because it is expressly forbidden by the state constitution, just as the constitution of the United States bars it. On the other hand the Supreme Court of the United States as well as the New York Court of Appeals has

expressly declared that printed obscenity is protected by neither constitution. It is simply a crime and its perpetrators have been proclaimed outlaws by every constitution and the statutes of every state and every country under Anglo-Saxon institutions and in most of the other civilized nations. All of us as citizens are censors of crime in every form and by law required to aid in its suppression. But as to censorship of the sort against which American constitutions provide, that is gone forever. In the language of the Court of Appeals in the case of People v. Most, " the punishment of those who publish articles which tend to corrupt morals, induce crime and destroy organized society, is essential to the security of freedom and the stability of the state." " While all the agencies of Government," the same decision adds, " executive, legislative and judicial, cannot abridge the freedom of the press, the legislature may control and the courts may punish the licentiousness of the press."

VIII

NEW YORK'S OLD LAW EMASCULATED

NO state in the Union has tried harder than New York to abate by legislation the evil of printed and pictured obscenity. In 1868, more than half a century ago, a law was passed entitled "An act for the suppression of the trade in and circulation of obscene literature, illustrations, advertisements and articles of indecent or immoral use, and obscene advertisements of patent medicines." This old statute employed the words "obscene and indecent" as descriptive of printed matter forbidden and the penalty was fixed at imprisonment in the county jail for not more than one year or a fine of not more than a thousand dollars. That act of 1868 expressly imposed on all judges the duty to charge the grand jurors to take notice of all violations against the act at each term of the court at which they presided.

In 1872 (Chapter 747) a new act was passed similar to that of 1868 but with the added power to superintendents of the poor and commissioners of charities to prosecute and recover penalties under the act.

The next year (Chapter 527, Laws of 1873) an act was passed incorporating the New York Society

for the Suppression of Vice whose object stated in the third section of the act was " the enforcement of the laws for the suppression of the trade in and circulation of obscene literature, and illustrations, advertisements, and articles of indecent and immoral use, as it is or may be forbidden by the laws of the State of New York or of the United States."

By Chapter 777 of the Laws of the same year (1873) the anti-obscenity act was amended chiefly by increasing the penalty for its violation and discriminating between offenders of less than twenty-one years of age and those over that age.

In 1881 (Chapter 676) the law was incorporated in the Penal Code (Section 317) with a change in the penalty to the effect that violation was a misdemeanour and punishable as such.

Down to this enactment the only adjectives used to describe the things forbidden were " obscene " and " indecent." In the original law these words were used conjunctively; afterward indecency was dropped but later reinserted and it appears in this act of 1881 together with " obscene " connected by the disjunctive " or " reading " obscene or indecent book, writing paper " and so on.

In 1884 (Chapter 380) the law was again amended in the direction of greater stringency.

By Chapter 692 of the Laws of 1887 the anti-obscenity law was broadened by adding four new descriptive words of the things forbidden so that

any " obscene, lewd, lascivious, filthy, indecent, or disgusting " publication was barred from circulation.

An amendment was made in 1900 (Chapter 731) relating to slot machines showing moving pictures. This writer was then a member of the State Senate and aided in passing this amendment.

In 1909 (Chapter 88) the anti-obscenity act was reënacted as Section 1141 of our present Penal Law. It is an excellently drawn statute and has served as the model upon which the Federal Government and thirty-three other states have formed their anti-obscenity laws.

Thus it is seen that the suppression of printed or pictured obscenity has been for fifty-eight years the expressed public policy of New York State. There never was any doubt that these laws as passed by successive legislators represented the overwhelming moral sentiment of the people and there is no less doubt now that the same preponderance of moral sentiment is on the side of cleansing our literature of its vileness and depravity. The decent people just as far outnumber the other kind now as they did in 1868.

But let it not be forgotten that the statute of 1868 created no new crime when it declared the circulation of obscene prints and objects a penal offense. It was a crime to do so under the common law in England for centuries before our separation from that country. The same common

law was American Law during the colonial period and was taken over as the law of the land by all the new states when they threw off the yoke of George the Third. Thus in the case of Willies v. Warren, decided in 1859 and found in the first volume of the reports of the old Common Pleas Court of New York City and County at page 594, Judge Brady declared that "it is an indictable offense at common law to publish an obscene book or print, and so of any offense tending to corrupt the morals of the people."

One would think that a mouse could not crawl through the New York law, so carefully worded and all inclusive is its language. Yet the life has been crushed out of it by the intermediate court of appeals. Under that unfortunate ruling a deluge of obscenity engulfs the land.

In 1884 the New York Court of Appeals, the highest court in the state, had construed the statute and gave to it full force and effect. The defendant had been convicted of selling indecent and obscene photographs. The court of appeals affirmed the conviction unanimously. Its strong and illuminating opinion is found in the case of People v. Muller at page 408 in the 96th volume of its reports. The court approved as the test of an obscene publication the one given in an English case decided in 1868 and universally accepted ever since in every jurisdiction under Anglo-Saxon institutions. By its unanimous decision in that case the

highest court of New York State declared that "The test of an obscene book was stated in Regina v. Hecklin (L. R., 3 Q. B. 369) to be, whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences, and who might come into contact with it." The full text of the opinion is found at page 119. It is a classic which deserves reading.

IX

SALUTE MASSACHUSETTS

JUST look at good old Massachusetts! Her law, although worded differently from the Federal statutes, is no more effective than the Federal laws under the common sense interpretation of the Federal courts. Yet she keeps herself clean from the filth that circulates around her everywhere in defiance of the national laws. It is a shame that she should be subjected to the streams of filthy stuff which finds its way across her borders and imposes upon her the burden of combating its distributors aided as they are by her sister states and the Federal Government, through their utter indifference to violations of their own laws.

Massachusetts is still found in her old place, upholding American ideals and moral standards. A single instance of her vigilant guardianship of the public morals will be given here. In 1925, a notorious magazine was issued and sent out for sale throughout the country. A large consignment went to the Bay State. The Watch and Ward Society notified the newsdealers that the magazine was violative of Massachusetts law. That is the usual method employed by the Society to stop the sale of indecency in print or picture.

Result, not a regular newsdealer of standing would handle the designated magazine. If they did they would promptly be indicted and brought to trial, and the Massachusetts courts have a way of making short shift of such lawbreakers. The corporation publisher in New York, accustomed to defy the statute of its home state, determined to show those Massachusetts people what an up-to-date publishing house could do to them. They sent their circulation manager to Boston who proceeded to arrange for distribution through independent newsdealers of the Massachusetts consignment which was then in possession of the New England News Company for the purpose of returning the magazines to the publishers as unsold.

Immediately the independent newsdealers were indicted, convicted and punished, the dealers by substantial fines and the bold circulation manager by six months in the House of Correction. The sentence of the manager was later changed to a fine of one thousand dollars. He had escaped to New York but was brought back to Massachusetts for trial through extradition proceedings and had to take his punishment in the state whose law he defied.

Now those magazines came from New York. Of course they were openly published and sold there without effort on the part of officialdom to suppress them. But they went across state lines presumably by common carriers or through the mail.

To introduce them into interstate commerce is just as great an offense as depositing them in the mail would be. In either case the maximum penalty is five years imprisonment or a fine of $5,000 or both.

There was little to hinder the Federal authorities from obtaining the evidence of this crime perpetrated against the people of the United States by this publisher and its agents. Why were they not punished? There is but one conclusion. The Federal authorities did not try to bring these lawbreakers to justice for the same reason which holds the New York authorities from making any effective move against the nasty stuff which loads the news stand everywhere within the Empire State. That reason is fear of the newspaper and magazine press which has zealously espoused the cause of obscene prints. Public officials cower in abject terror before these publications. What Massachusetts has done can be done by the nation and by every state in the Union when their paid servants are taught through an aroused moral sentiment that they must serve their masters instead of the profiteers engaged in the ignoble business of debauching the morals of the rising generation.

X

FEDERAL LAWS UNENFORCED

IN the New York Statute the thing prohibited is described as an *obscene publication.* The Massachusetts prohibition runs against a *publication containing obscene language.* Thirty-three state statutes and the Federal statutes follow the New York phraseology as do the statutes of Porto Rico, the Philippines, Hawaii and the District of Columbia. Thirteen states follow the form of the Massachusetts law.

No book is obscene in entirety. The very worst of them merely contain obscene matter. So that, viewed in the light of common sense, the two forms of statute mean precisely the same thing. That is what the Federal courts have uniformly held, for they have over and over again declared that if a book contains obscene matter it is an obscene book.

That was the view taken by the New York courts down to 1922 when an unfortunate expression crept into a prevailing opinion in a decision of the New York Court of Appeals to the effect that a book alleged to contain obscene language " must be considered broadly as a whole." This dictum is construed by the New York County District Attorney as requiring him to instruct the grand jury to read

all of a publication no matter how small a part of it is objectionable, thus changing what was the uniform practice of his office down to 1922. True that expression was used in a civil case and not in a criminal prosecution in which the anti-obscenity law was being directly enforced and it is therefore of doubtful authority in a criminal prosecution under the penal statute. Nevertheless the court did say so by a majority vote of five to two and, coming from the highest court in the state, the dictum has had a most lamentable effect upon the lower courts and the prosecuting officials of New York City—the main source of supply of obscenity for the entire country.

Official reports of cases in which prosecutions were instituted under the anti-obscenity statutes of the several states are comparatively few, probably because most cases are disposed of in the lower courts whose decisions do not find place in the printed court records. It follows that courts and lawyers in other states, when a case does arise, will naturally consult among others the New York reports. In them will be found this unhappy expression of the New York Court of Appeals which was just mentioned and another decision by the Appellate Division, the intermediate appellate court, which woefully emasculates the New York statute. Those New York decisions will serve in other states the purposes of the offenders against decency.

Since the Federal anti-obscenity statutes are in

substance the same as that of New York in mentioning *obscene publications*, instead of *publications containing obscene language*, the Federal decisions are of special importance in every state whose statute follows the New York form, especially as they offset the New York decisions. Fortunately there are many of them and they cover probably every serious question which can arise over the construction of that form of statute which is found in more than three-fourths of the local jurisdictions under the American flag. They are directly contrary to the New York decisions mentioned, although in perfect harmony with the leading New York Court of Appeals case, People against Muller.

So far as any difficulty arises in the enforcement of the Federal statutes, it is not found in the Federal courts. They invariably have given to those laws a force and meaning which insures successful prosecution of the guilty. Indeed the courts have kept the ways well greased to facilitate the skidding of disseminators of obscenity into prison cells.

For the non-enforcement of the Federal statutes, the responsibility lies elsewhere than in the courts. The Federal laws are openly and flagrantly violated hourly all over the country. There is little trouble about catching the offenders. There are innumerable Federal officials who have daily notice of the violations of the law. Yet the criminals go unpunished.

Obviously very little effort would be required to get legal evidence that the numerous filthy publications bearing the names of their publishers and openly displayed and sold in bookstores and at news stands, are also sent through the mail—as they in fact are sent conspicuously and by the ton. They do not go as single wrapped copies addressed to individuals, firms or corporations, but in bulk much as freight is shipped. No reasonable effort is made to get the evidence, no criminal prosecutions are instituted against their publishers. No adequate explanation is forthcoming for this notorious inaction of the Federal authorities. None could be given.

But there is another Federal statute which, if enforced, would help to eliminate the great bulk of indecent prints from circulation. A single conviction of just one prominent offender would scare the others into observance of the laws.

There must be some reason for the failure to enforce these Federal laws. It is not found in the weakness of the statutes nor in the attitude of the Federal courts. What is it then? The same as that which blocks enforcement of the New York law undoubtedly, and that is the abject fear of the press on the part of public officials.

Let us not be deceived. Public officials are excessively sensitive to public opinion. That is as it should be. Unfortunately they take the views of the press as the voice of the people in the ab-

sence of other convincing evidence to the contrary. To them the newspaper is as the bogeyman to a timid child.

As is pointed out by Don C. Seitz in a recent article in *The Outlook,* everything in newspaper management is on a strictly commercial basis.

Personal interests of the owners of the newspapers are not always in harmony with the public interests. When there is a conflict on which side will the newspapers be found, on the side where their profits lie or on the other?

Nevertheless those newspapers are the organs of public information and their influence extends throughout the country. No public man dares to incur their enmity unless driven to it by the imperative mandate of his own constituents.

In other states than New York it is heartening to note that the press is less commercialized. Conspicuous examples of public service rendered by many newspapers have been given. Yet the personal interest is always reflected in the policy of any newspaper.

The governors of the states and the mayors of cities are elected by popular vote. They and the other elected officials dominate their respective administrations for whose good conduct they are held responsible. The appointive officials must take their cue on public questions from their superiors. All are dominated by the heads of the administration of which they form a part. They are careful to take

no position not known to be agreeable to those who appointed them. They are keenly alert to gain and keep the good will of the press regardless of the merits of any controversial public question.

With the government at Washington all its members are anxious to hold their jobs of course. Whether they will or not depends in large measure upon the attitude of the New York newspapers whose influence is great throughout the country. But the state of New York itself is the biggest prize every national administration strives to capture.

New York is and always has been a pivotal state having more electoral votes than any other and more than several of the other doubtful states combined. Hence the political weather-vane is always up in Washington to gauge the slightest breeze of public sentiment in New York. Just now the wind that blows from the metropolis indicates powerful opposition there against the suppression of the traffic in obscenity. That determines the attitude of the administration and extends of course to the Federal functionaries who have to do with the prosecution of offenders against the two excellent statutes forbidding the depositing in the mail or the introduction into interstate commerce of printed or pictured filth.

Fear of the newspapers is the cause of the trouble. The public prosecutors have not the courage to move against the united publishing

interests with their millions of publications circulating throughout America and demoralizing the future citizens of the nation and the states in bold and open defiance of the Federal laws. The same situation is found in more than one state.

XI

THE VOICE OF THE WORLD

EVEN before the World War the traffic in obscene publications had engaged the attention of civilized nations and international coöperation had been established between them for its suppression. Surprising as it may seem, it was France who initiated the movement and it was at Paris in 1910 that the representatives of sixteen countries including our own met at her invitation and agreed upon an "arrangement" for "the repression of the circulation of obscene publications."

The French Government stated that the object of the arrangement was "to deal effectively with what has grown to be an international evil" and urged that "we must set up a common defensive organization." But this international conference of 1910 did not stop with the consummation of the arrangement between the powers represented at the conference. It also drafted a more formal and solemn convention to be proposed to the nations of the world and looking to the adoption in the future of a common code of laws to be observed by all and enforced by international coöperation for the suppression of obscene publications.

The World War came to defeat consummation of the project. Not until 1922 was it revived by a memorandum submitted to the League of Nations on behalf of the British Government which pointed out that "the international trade in obscene publications constituted a social evil which could only be effectively dealt with by international coöperation," and stigmatized the traffic "as a moral pest of which all civilized countries wish to be rid."

The League of Nations took favourable action and authorized France, in view of its having taken the initiative in convoking the conference of 1910, to call a new conference at Geneva, Switzerland, "to be composed of plenipotentiaries empowered to draw up the text of a new convention and to sign such a convention."

Copies of the draft convention of 1910 was to be the basis of discussion and questionaries to gather the views of all countries upon the proposals were sent out. Accordingly upon the invitation of France a second international conference convened at Geneva in 1923 under the auspices of the League, the United States participating in an advisory capacity only. For obvious reasons Germany and Russia did not attend although they had been represented at the conference of 1910 and became parties to the arrangement then entered into.

Mr. Gaston Deschamps, the delegate of France,

was unanimously elected President upon the nomination of Sir Archibald Bodkin, the delegate of the British Empire. The delegate from India was made Vice-President.

A lively appreciation of the seriousness of the evil aimed at and the evident desire of the assemblage to devise and apply an effective remedy for it was marked throughout the proceedings. It was France that took the lead as it had done in the conference of 1910. Indeed that country would have gone much further than the conference did in its final action. Great Britain was scarcely second to France in telling activities and wise counsel. The United States was lamentably inactive. But the will to accomplish something substantial and effective triumphed over all obstacles and an excellent international code was adopted. It contains sixteen articles but the substance is contained in the first, the other fifteen dealing with details unnecessary to this discussion. The substantive part of the convention follows:

"Article 1

"The High Contracting Parties agree to take all measures to discover, prosecute and punish any person engaged in committing any of the following offenses, and accordingly agree that

"It shall be a punishable offense:

"(1) For purposes of or by way of trade or for distribution or public exhibition to make or produce or have in possession obscene writings, drawings,

prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects:

"(2) For the purposes above mentioned to import, convey or export, or cause to be imported, conveyed or exported, any of the said obscene matters or things, or in any manner whatsoever to put them into circulation:

"(3) To carry on or take part in a business, whether public or private, concerned with any of the said obscene matters or things, or to deal in the said matters or things in any manner whatsoever, or to distribute them or to exhibit them publicly or to make a business of lending them:

"(4) To advertise or make known by any means whatsoever, in view of assisting in the said punishable circulation or traffic, that a person is engaged in any of the above punishable acts, or to advertise or to make known how or from whom the said obscene matters or things can be procured either directly or indirectly.

"Article 2

"Persons who have committed an offense falling under Article 1 shall be amenable to the Courts of the Contracting Parties in whose territories the offense, or any of the constitutive elements of the offense, was committed. They shall also be amenable, when the laws of the country shall permit it, to the Courts of the Contracting Party whose nationals they are, if they are found in its territories, even if the constitutive elements of the offense were committed outside such territories.

"Each Contracting Party shall, however, have the

right to apply the maxim *non bis in idem* in accordance with the rules laid down in its legislation."

Thus is the voice of the civilized world raised against corrupting publications while America wallows in a very sea of them and with rare exceptions making no serious attempt to dam the flood.

The tremendous significance of this world convention and the international code framed by it should not be lost on America. Every delegate was a plenipotentiary bound by the most sacred obligations to represent faithfully the sentiments and desires of the nation he represented. What was said and done there may be taken, not merely as the words and acts of distinguished individuals —and they were distinguished—but rather as the voice and deed of the millions of human beings making up the populations of their several countries. In that aspect the views of the members of the world conference may be taken to reflect with reasonable certainty the dominant public sentiment of every nation participating in the deliberations.

That the corrupting influence of obscene prints, pictures and objects tended to undermine the social structures of humanity was the dominant note of this momentous gathering of "the *élite* of mankind," as the president of the conference characterized them. A few excerpts from their utterances will show how world wide is the obscenity evil which so sorely afflicts America.

The Government of the Serb-Croate-Slovene Kingdom had officially expressed the wish that exhibitions on the public highway or in any public place of obscene pictures, writings or articles might be prohibited. On this subject M. Hennequin, the delegate of France, substituted for M. Deschamps, remarked:

"The public exhibition of anything contrary to morality and public morals is not merely a monstrous outrage, but also constitutes what has been called 'ocular rape.' . . . The restriction of the freedom to exhibit is a restriction which is forced upon the governments, as it is one of the main reforms by which the moral standards of a country can be raised and the innocence of childhood placed beyond the reach of the dangers resulting from the sight of infamies of this nature."

Again: commenting upon the proposal of Switzerland that guilty persons should be punished in a country other than that in which the offense had been committed, M. Hennequin declared:

"What we should aim at, and what we should achieve, is, in fact, that these 'corruptors of nations' —as they are termed in the report submitted to the conference of 1910 on behalf of the committee examining Article 1—should not be allowed to go unpunished."

M. de Graaf of The Netherlands, discussing the same subject, asserted:

"I think that the British delegate suggested the solution of the question when he referred to certain exceptions in the legislation of his own country. These exceptions related to piracy and slavery, which are regarded as offenses against human civilization. But there was a time when it was not so—when slavery was actually legal. In the present case obscene publications are not yet regarded as an offense against civilization; we have to convince public opinion that the offense against civilization in this case is even more serious than in the case of piracy or slavery."

M. Oldenburg, delegate of Denmark, said:

"My government desires to ratify at the earliest possible opportunity the convention which we are now drawing up."

M. Matsuda, delegate of Japan, announced:

"In order to give full effect to the present convention, my government will raise no objection in principle to the noble object which this conference seeks to attain. The Japanese Government with the intention of suppressing obscene publications, contending energetically against all offenses against morality and preventing immoral productions from crossing the frontier, has, in addition to the provisions of the penal code, issued a number of orders and promulgated various decrees."

Prince Arfaed-Dovleh, Persia's delegate, presented a note to the conference which stated that

there was nothing in the convention incompatible with the laws and customs of Persia and added:

"In Persia it has always been absolutely prohibited to publish or circulate pictures of the kind referred to in the convention."

M. Tcheng Loh, of China, said he desired to show "the great interest taken for some forty centuries by the rulers and people of China in the question of the suppression of the circulation and sale of obscene publications" and added:

"The authors of books outraging decency—it was not even necessary that the books should be openly obscene—were liable to the same punishment as persons guilty of high treason."

M. Cavazzoni, delegate of Italy, said:

"All the essential clauses of the convention which we have just approved are already included in a bill against pornography, which was submitted to the Italian Chamber last June by my colleague, M. Bellotti. The principle underlying this bill has already been accepted by the Government and by all parliamentary groups. An Italian, therefore, may be permitted to feel some pride in seeing his country amongst the nations which will be the first to put our decisions into effect."

M. Fernandez y Medina, delegate of Uruguay, thus expressed his sentiments:

"On behalf of one of the countries of Spanish

America, Uruguay, I desire to express my very lively satisfaction in the results obtained by this conference, which has succeeded in drawing up a convention, the very mention of which would, a little while ago, have given rise to sarcasm and persiflage."

The foregoing excerpts from the proceedings of this conference, charged with the duty of strengthening, by international laws, the safeguards of home and family which enlightened nations have thrown around their social structures, rightfully reflect the spirit and purpose of this momentous gathering.

At the close of the deliberations M. Deschamps delivered an eloquent and inspiring address fraught with sentiments of high devotion to the cause of a nobler and purer humanity. He concluded by abjuring his hearers as the *élite* of mankind, not to abandon the masses "to the deadly attacks of all the ferments of corruption, to the pestilence that spreads from all the centres of infection which lurk in the depths of populous cities, and which distils a poison that spares neither the meanest village nor the humblest abode."

XII

LOOKING FORWARD

OF all nations that have grown to greatness and renown within recorded time, none can be compared with our own for celerity. We have attained a foremost place among the peoples of earth within the short limits of a hundred and thirty-seven years—reckoning from the establishment of the Federal Government—and the present writer has lived nearly one-half of that period. How far their restless energy and genius for large accomplishment in all fields of human endeavour will carry the American people in the centuries to come is something that baffles imagination. As yet, we can scarcely be said to have evolved a native culture. Our conglomerate population, particularly in the larger cities, are of many different cultural strains. When blended and stabilized as they must be in the course of time, what will be the accepted American code of life? It is in the making now. In this, its formative period, our generation will impart its impulse to the forces which are shaping the future of America.

Most right-thinking men and women are alive to their obligations toward their families, their neighbours and the state. Their obligation to the

future of their country is sensed less keenly. Yet it is an obligation that may not be ignored by him or her who, loving America, would shape her future toward the realization, by myriads yet unborn, of the untold blessings which may be theirs if our people remain true to American ideals.

Those ideals never grow old and never fade. They are as eternal as God Himself Who set them up as a goal toward which a righteous people should ever strive.

Foremost among them is morality, public and private. By that term is not meant the moral tenets of any particular denomination, sect or cult, but that fundamental morality which is recognized by all religions and all civilized peoples as the foundation of well-ordered human society.

So far as history reveals, the great nations of the past grew to power and influence through the staunch character of their peoples. The beginnings of decay were marked by relaxation of family ties, by sexual promiscuity and such unspeakable practices as are denounced in St. Paul's Epistle to the Romans. Rome fell through the loss by her citizens of that rigid virtue which had builded the republic and founded the empire. It was destroyed through immorality just as certainly as were Sodom and Gomorrah.

Thoughtful citizens should consider the similar symptoms of decay which are already appearing in American life. We see them in the growing

contempt in which those moral restraints which were cherished in the early days of our country are held. The drama, literature, and social customs of our time bear evidence of a far departure from the old American moral code.

The growing contempt for law has given us the unenviable reputation of a crime-ridden people. The use of narcotic drugs has grown to alarming proportions while disregard of the prohibition laws has resulted in perceptibly debauching the lives of the rising generation among whom the pocket-flask has come to be regarded as a prime attraction at social gatherings, and a sort of gauge of " honour."

The growing percentage of divorces to the number of marriages is a national disgrace. Sexual promiscuity is increasing at an alarming rate. The tolerant or indifferent attitude of press, pulpit and platform toward these evils is as ominous as it is reprehensible.

Is our decadence to be as rapid as our rise? Is it because the period of growth of ancient nations was slow that they lived so long? Is it a law of national life that the faster a nation grows, the earlier it will decay?

This writer is no alarmist. On the contrary he has unbounded faith in the heaven-appointed destiny of this nation. But the adage, " The Lord helps those who help themselves," may be as true when applied to nations as it is when applied to individuals.

Between the primal forces of good and evil the relentless war goes on. Since time began the eternal battle has swayed to the side of righteousness only through irresistible pressure. By slow degrees, the forces of evil have been pushed back throughout the ages, but only on those fields where the armies of God were marshalled in force, fully equipped and fighting heroically. Relaxation of vigilance or effort has always been attended by an advance of the enemy.

Every patriot should consider himself and herself as a soldier in this unceasing fight. The fact that the enemy advances to-day, should only serve to renew our courage and our determination to drive him back. It is written that we must prevail. But the implied condition of that assurance is that every one must do his duty.

Of all the alarming present-day conditions, none is more dangerous than the prevalent toleration of putrid prints and pictures, which freely circulate in defiance of law. It is a menace to our institutions because these vile things debauch the morals of the young of both sexes. They defile the home and profane the family altar; they are preparing the way for future generations of immoral Americans. Of what avail are the efforts of home and church and school to keep childhood clean and wholesome when the minds and souls of the young are endangered by the filthy prints which everywhere surround them—on the news stands, in the sta-

tionery stores, in the circulating libraries? To keep this debasing stuff out of the hands of the young is a work which no right-minded man or woman can conscientiously shirk.

As we have already asserted, the men and women of clean lives and patriotic impulses far outnumber the other kind. Dominant public sentiment is yet sound and true to American ideals. But that sentiment is unorganized, misled, and largely inarticulate. But it can, and shall be marshalled and its voice be heard. When it is, no power will dare stand against it and the flood of printed and pictured obscenity now surrounding us will subside as quickly as it appeared, in the wake of the World War.

APPENDICES

I. Law of England

In Anglo-Saxon England there was no distinction between law and ecclesiastical jurisdiction but after the Norman conquest the common law courts were separated from the ecclesiastical courts and gradually absorbed the jurisdiction of the latter. Conflict of jurisdiction naturally arose and it is not surprising to find it in the administration of the laws against public indecency.

Obviously no discussion of the crime of obscenity and of its punishment would be intelligible without an incursion into the domain of law. American anti-obscenity statutes are in the main mere codifications of the common law of England where originated not only the laws against published obscenity but also the great bulk of all other American laws. The obscene book or picture was an outlaw and treated as an enemy of society upon the ground, iterated and re-iterated in the decisions of the common law courts, that it was inimical to public morals and particularly as tending to corrupt the morals of youth.

In ancient England the punishment of offenses against public morals seems to have been relegated to the ecclesiastical courts. But in the first year of George II (1727) in the case of the King v. Curl, it was definitely settled by a unanimous opinion of King's Bench that "an obscene book is punishable as a libel" at common law.

The growing stringency of the law against obscenity proceeded side by side with the growth of per-

sonal liberty and the development of the rights of free speech and a free press.

The plain fact is that censorship as it existed in England, while ruthless in suppressing the publication of criticisms of government and the royal prerogative, tolerated obscene publications, leaving them to be dealt with by the criminal courts under the common law.

Obscenity whether exhibited, written or spoken, never had any rights under English law. It was always a crime *in se* under Anglo-Saxon institutions and not one created by a prohibiting statute merely. It was more and more strenuously searched out and punished as the rights of free speech, free press, free assembly and freedom of worship gained better and fuller recognition.

In the Pennsylvania case of Commonwealth v. Sharpless, decided in 1815, the Chief Justice of the Supreme Court of that state in a rarely erudite opinion traces the history of obscenity as an indictable offense at common law. The defendant had been indicted for exhibiting for money an obscene picture in a private house in Philadelphia and the court below gave judgment against him.

Perhaps nowhere is there to be found in this country a clearer and more concise historical summary of the growth of the common law jurisdiction than is contained in the opinion of the Chief Justice. Because of its scholarly and lucid exposition of the origin of all American anti-obscenity laws it is here given. The Chief Justice said:

"In England, there are some acts of immorality, such as adultery, of which the ecclesiastical courts

have taken cognizance from very ancient times, and in such cases, although they tended to the corruption of the public morals, the temporal courts have not assumed jurisdiction. This occasioned some uncertainty in the law; some difficulty in discriminating between offenses punishable in the temporal and ecclesiastical courts. Although there was no ground for this distinction in a country like ours, where there was no ecclesiastical jurisdiction, yet the common law principle was supposed to be in force, and to get rid of it, punishments were inflicted by act of the assembly.

"There is no act [in Pennsylvania] punishing the offense charged against the defendants and therefore the case must be decided upon the principles of the common law. That actions of public indecency were always indictable, as tending to corrupt the public morals, I can have no doubt; because even in the profligate reign of Charles II, Sir Charles Sedley was punished by imprisonment and a heavy fine for standing naked in a balcony, in a public part of the city of London. It is true that, besides this shameful exhibition, it is mentioned in some of the reports of that case, that he threw down bottles containing offensive liquor among the people; but we have the highest authority for saying that the most criminal part of his conduct, and that which principally drew upon him the vengeance of the law, was the exposure of his person.

"For this I refer to the opinion of the judges in the King v. Curl (2 Str. 792); Lord Mansfield, in the King v. Sir Francis Blake Delaval, etc. (3 Burr. 1438), and of Blackstone in the fourth volume of his Commentaries, page 64. Neither is there any

doubt that the publication of an indecent book is indictable, although it was once doubted by the court of the King's Bench, in the Queen v. Read (in the sixth year of Queen Anne). But the authority of that case was destroyed, upon great consideration, in the King v. Curl (I George II, 2 Str. 788).

"The law was in Curl's case established upon true principles. What tended to corrupt society was held to be a breach of the peace, and punishable by indictment. The courts are guardians of the public morals, and therefore have jurisdiction in such cases. Hence it follows that an offense may be punishable, if in its nature and by its example it tends to the corruption of morals, although it be not committed in public."

2. The King v. Curl

Since Curl's case, cited in the foregoing Pennsylvania decision, marked the definite assumption of common law jurisdiction and set at rest whatever doubts formerly existed as to the competency of the common law courts to render judgment against traffickers in obscene publications, some consideration of that case is fittingly incorporated here.

In the first year of the reign of George II (1727), Curl was indicted and found guilty on an indictment charging him with publishing an obscene book entitled, "Venus in the Cloister," or "The Nun in Her Smock." On a motion for arrest of judgment counsel for the defense argued that the offense was one of which the ecclesiastical courts alone might take cognizance and that the common law courts were without jurisdiction to give judgment in such a case.

In reply the Attorney General argued:

"Destroying that is destroying the peace of the Government, for government is no more than public order, which is morality. My Lord Chief Justice Hale used to say, Christianity is part of the law, and why not morality too? I do not insist that every immoral act is indictable, such as telling a lie, or the like; but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offense of a public nature. And upon this distinction it is that particular acts of fornication are not punishable in the Temporal Courts, and bawdy-houses are. In *Sir Charles Sedley's case* it was said that this Court is the custos morum of the King's subjects. I Sid. 168. And upon this foundation there have been many prosecutions against the players for obscene plays, though they have had interest enough to get the proceedings stayed before judgment. Tremayne's Ent. 209, 213, 214, 215. 3 vol. State Trials, *Lord Grey's case.*

"Mich. 10 W. 3, *Rex v. Hill,* the defendant was indicted for printing some obscene poems of my Lord Rochester's, tending to the corruption of youth; upon which he went abroad, and was outlawed; which he would not have done if his counsel had thought it no libel.

"The Spiritual Courts punish only personal spiritual defamation by words; if it is reduced to writing, it is a temporal offense. Salk. 552. Mo. 627, and it is punishable as a libel. My Lord Coke in the case de libellis famosis had nothing in view but scandalous defamatory libels. Libellus is not always to be taken as a technical word; in this case it may stand as an obscene little book. And as to the case of *Read,* there was no judgment, but it went off upon

the Chief Justice's saying, Why don't you go to the Spiritual Court; which was giving a false reason for that sudden opinion, now it appears there is no instance of the Spiritual Court's intermeddling, where it is reduced to writing or in print."

The Chief Justice remarked:

"I think this is a case of very great consequence, though if it was not for the case of *The Queen v. Read*, I should make no great difficulty of it. Certainly the Spiritual Court has nothing to do with it, if in writing: and if it reflects on religion, virtue, or morality, if it tends to disturb the civil order of society, I think it is a temporal offense. I do not think libellus is always to be taken as a technical word. Would not trover lie 'de quoadam libello intitulat' the New Testament, and does not the Spiritual Court proceed upon a libel?"

Justice Fortescue's comment was:

"I own this is a great offense, but I know of no law by which we can punish it. Common law is common usage, and where there is no law there can be no transgression. At common law drunkenness, or cursing and swearing, were not punishable; and yet I do not find the Spiritual Court took notice of them. This is but a general solicitation of chastity, and not indictable. *Lady Purbeck's case* was for procuring men and women to meet at her house, and held not indictable, unless there had been particular facts to make it a bawdy-house. To make it indictable, there should be a breach of the peace, or something tending to it, of which there is nothing in this case. A libel is a technical word at common law, and I must own the case of *The Queen v. Read* sticks with me, for there was a rule to arrest the judgment

nisi. And in Sir Charles Sedley's case there was a force in throwing out bottles upon the people's heads."

Justice Reynolds declared:

"It is much to be lamented if this is not punishable; I agree there may be many instances where acts of immorality are of spiritual cognizance only; but then those are particular acts, where the prosecution is pro salute animae of the offender, and not where they are of a general immoral tendency; which I take to be a reasonable distinction. *Read's case* is indeed a case in point. But I confess I should not have been of that opinion. Libellus does not ex vi termini import defamation, but is to be governed by the epithet which is added to it. This is surely worse than *Sir Charles Sedley's case*, who only exposed himself to the people then present, who might choose whether they would look upon him or not; whereas this book goes all over the Kingdom. Drunkenness and swearing were punishable in the Spiritual Court before the Acts which made them temporal offenses, and in which the jurisdiction of the Spiritual Court is saved."

The ancient report then goes on:

"Probyn J. inclined this to be punishable at common law, as an offense against the peace, in tending to weaken the bonds of civil society, virtue, and morality. But it being a case of great consequence, it was ordered to stand over for a further argument.

"And this term Page J. being come into the King's Bench in the room of Justice Fortescue, it was to have been spoke to by Mr. Solicitor General and myself. But Curl not having attended me in time, I acquainted the Court I was not prepared; and my want of being ready proceeding from his own neglect,

they refused to indulge him to the next term. And in two or three days, they gave it as their unanimous opinion that this was a temporal offense. They said it was plain the force used in *Sedley's case* was but a small ingredient in the judgment of the Court, who fined him £2000. And if the force was all they went upon, there was no occasion to talk of the Court's being censor morum of the King's subjects. They said if Read's case was to be adjudged, they should rule it otherwise; and therefore in this case they gave judgment for the King. And the defendant was afterward set in the pillory, as he well deserved."

It is noteworthy that, whatever conflicts arose between the ancient English courts over jurisdiction, no question was ever raised as to the importance to the state that the offense of obscenity should be punished by some authority. Only rarely does a case of obscene libel appear in the printed court records of those distant days, but enough remains to plainly show that the offense was always punishable under the law of England even in very ancient times.

3. The Queen v. Hecklin

The leading English case of more modern times which is recognized as the highest authority throughout the Anglo-Saxon world is Queen v. Hecklin decided by the Court of Queen's Bench in 1868. That case has been universally accepted as authoritative and is uniformly followed by other courts throughout the English-speaking world. The New York Court of Appeals expressly accepted it as the law of New York State in People v. Muller, decided in 1884, as do the Federal courts uniformly.

The controversy arose over a seizure of a number of obscene pamphlets under an English statute permitting seizure of obscene publications kept for sale or distribution. Under the statute the justices of a borough authorized the seizure and ordered them destroyed. This order of the justices was reversed by the Recorder and an appeal taken from his decision to Queen's Bench. The pamphlets were entitled "The Confessional Unmasked; showing the depravity of the Romish priesthood; the iniquity of the confessional and the questions put to females in confession." About half of the pamphlet was not obscene but the other half related to impure and filthy acts, words and ideas. It was not sold for profit but distributed for propaganda purposes only by a religious zealot. The other facts appear in the opinion of Lord Cockburn which is here given in full:

Cockburn, C. J.: "We have considered this matter, and we are of opinion that the judgment of the learned recorder must be reversed, and the decision of the magistrates affirmed. This was a proceeding under 20 & 21 Vict. c. 83, s. 1, whereby it is provided that, in respect of obscene books, &c., kept to be sold or distributed, magistrates may order the seizure and condemnation of such works, in case they are of opinion that the publication of them would have been the subject-matter of an indictment at law, and that such a prosecution ought to have been instituted.

"Now, it is found here as a fact that the work which is the subject-matter of the present proceeding was, to a considerable extent, an obscene publication, and, by reason of the obscene matter in it, calculated to produce a pernicious effect in depraving

and debauching the minds of the persons into whose hands it might come. The magistrates must have been of opinion that the work was indictable, and that the publication of it was a fit and proper subject for indictment. We must take the latter finding of the magistrates to have been adopted by the learned recorder when he reversed their decision, because it is not upon that ground that he reversed it; he leaves that ground untouched, but he reversed the magistrates' decision upon the ground that, although this work was an obscene publication, and although its tendency upon the public mind was that suggested upon the part of the information, yet that the immediate intention of the appellant was not so to affect the public mind, but to expose the practices and errors of the confessional system in the Roman Catholic Church.

"Now, we must take it, upon the finding of the recorder, that such was the motive of the appellant in distributing this publication; that his intention was honestly and bona fide to expose the errors and practices of the Roman Catholic Church in the matter of confessions; and upon that ground of motive the recorder thought an indictment could not have been sustained, inasmuch as to the maintenance of the indictment it would have been necessary that the intention should be alleged and proved, namely, that of corrupting the public mind by the obscene matter in question. In that respect I differ from the recorder. I think that if there be an infraction of the law the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior object in view (which is the immediate and primary object of

the parties) of a different and of an honest character.

"It is quite clear that the publishing of an obscene book is an offense against the law of the land. It is perfectly true, as has been pointed out by Mr. Kydd, that there are a great many publications of high repute in the literary productions of this country the tendency of which is immodest, and, if you please, immoral, and possibly there might have been subject-matter for indictment in many of the works which have been referred to.

"But it is not to be said, because there are in many standard and established works objectionable passages, that therefore the law is not as alleged on the part of this prosecution, namely, that obscene works are the subject-matter of indictment; and I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

"Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character. The very reason why this work is put forward to expose the practices of the Roman Catholic confessional is the tendency of questions, involving practices and propensities of a certain description, to do mischief to the minds of those to whom such questions are addressed, by suggesting thoughts and desires which otherwise would not have occurred to their minds. If that be the case as between the priest and the person confessing, it manifestly must

equally be so when the whole is put into the shape of a series of paragraphs, one following upon another, each involving some impure practices, some of them of the most filthy and disgusting and unnatural description it is possible to imagine.

"I take it therefore that, apart from the ulterior object which the publisher of this work had in view, the work itself is, in every sense of the term, an obscene publication, and that, consequently, as the law of England does not allow of any obscene publication, such publication is indictable.

"We have it, therefore, that the publication itself is a breach of the law. But, then, it is said for the appellant, 'Yes, but his purpose was not to deprave the public mind; his purpose was to expose the errors of the Roman Catholic religion especially in the matter of the confessional.' Be it so. The question then presents itself in this simple form: May you commit an offense against the law in order that thereby you may effect some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is, emphatically, no.

"The law says, you shall not publish an obscene work. An obscene work is here published, and a work the obscenity of which is so clear and decided, that it is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come would be of a mischievous and demoralizing character. Is he justified in doing that which clearly would be wrong, legally as well as morally, because he thinks that some greater good may be accomplished?

"In order to prevent the spread and progress of

Catholicism in this country, or possibly to extirpate it in another, and to prevent the state from affording any assistance to the Roman Catholic Church in Ireland, is he justified in doing that which has necessarily the immediate tendency of demoralizing the public mind wherever this publication is circulated? It seems to me that to adopt the affirmative of that proposition would be to uphold something which, in my sense of what is right and wrong, would be very reprehensible. It appears to me the only good that is to be accomplished is of the most uncertain character.

"This work, I am told, is sold at the corners of streets, and in all directions, and of course it falls into the hands of persons of all classes, young and old, and the minds of those hitherto pure are exposed to the danger of contamination and pollution from the impurity it contains. And for what? To prevent them, it is said, from becoming Roman Catholics, when the probability is, that nine hundred and ninety-nine out of every thousand into whose hands this work would fall would never be exposed to the chance of being converted to the Roman Catholic religion.

"To me it seems that the effect of this work is mischievous and against the law, and is not to be justified because the immediate object of the publication is not to deprave the public mind, but, it may be, to destroy and extirpate Roman Catholicism. I think the old sound and honest maxim, that you shall not do evil that good may come, is applicable in law as well as in morals; and here we have a certain and positive evil produced for the purpose of effecting an uncertain, remote, and very doubtful good.

"I think, therefore, the case for the order is made out, and although I quite concur in thinking that the motive of the parties who published this work, however mistaken, was an honest one, yet I cannot suppose but that they had that intention which constitutes the criminality of the act, at any rate that they knew perfectly well that this work must have the tendency which, in point of law, makes it an obscene publication, namely, the tendency to corrupt the minds and morals of those into whose hands it might come.

"The mischief of it, I think, cannot be exaggerated. But it is not upon that I take my stand in the judgment I pronounce. I am of opinion, as the learned recorder has found, that this is an obscene publication. I hold that, where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act; and that, as soon as you have an illegal act thus established, quoad the intention and quoad the act, it does not lie in the mouth of the man who does it to say, 'Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose.' The law does not allow that; you must abide by the law, and if you would accomplish your object, you must do it in a legal manner, or let it alone; you must not do it in a manner which is illegal. I think, therefore, that the recorder's judgment must be reversed, and the order must stand."

4. United States v. Harmon

As expressed in numerous statutes passed from time to time the public policy of the United States is to suppress obscene publications so far as its power

to do so permits under the limitations of the Federal constitution. The Federal courts have in a long line of decisions given full force and effect to the Federal statutes, particularly in respect of depositing obscene matter in the mail.

No lengthy dissertation upon these national laws is necessary beyond the illuminating opinions which have accompanied the decisions of the United States courts high and low. The Supreme Court of the nation has consistently overruled objections raised by defendants that the anti-obscenity laws were violative of the constitutional guaranty of a free press. Elsewhere is cited the leading case of Robetson against Baldwin. But before that decision the same court had said in *Ex parte Jackson* (96 U. S. 727) that " in excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals." After quoting at length the Federal Statute prohibiting obscene publications, pictures and objects from the mail the court declared:

" All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished."

In the case of United States against Harmon (45 Fed. Rep. 414) is one of the best opinions written by any judge on the subject of obscene publications and the sociological reasons for their suppression. Judge John F. Phillips was the author of this splendid contribution to the literature of a most vital sub-

ject. It is more than a mere judicial utterance. It is a comprehensive philosophical discussion of the evil of printed obscenity in many aspects. No apology is needed for presenting here the greater part of this outstanding opinion of a straight thinking American judge.

The case was one of illegally depositing in the mail a newspaper entitled, "Lucifer, the Torch Bearer," and containing obscene matter. The particular part of the newspaper against which complaint was made was an article purporting to have been written by a New York physician and was entitled, "A Physician's Testimony." It described certain revolting acts "in blunt, coarse terms, too indecent and filthy to be here given in *haec verba*," as the official report explains. On the trial a jury was waived on consent of both sides and all questions of law and fact were submitted for decision by the judge. Following is his opinion, in part:

OPINION OF JUDGE PHILLIPS

"It is objected that the Act of Congress under which this indictment was founded is in contravention of the first amendment of the Federal constitution, which declares that 'Congress shall make no law—abridging the freedom of speech or of the press.' Counsel has urged this objection with such force and vigour of reasoning as to entitle it to serious consideration under other conditions than those which exist. The constitutionality of the act in question has been affirmed by the court of last resort in the case of *Ex parte Jackson*, 96 U. S. 727. It is true, the direct question there presented was as to that branch of the statute denying the use of the mails

to lottery circulars, etc.; but the opinion of the court proceeds on the theory that the provision of the statute respecting lotteries is so closely allied to that declaring obscene literature non-mailable matter that it must rest upon the same principle, and thereupon proceeds to discuss the latter feature of the statute, and to uphold its constitutionality. Until overruled, this decision must control the action of this court.

"In view, however, of the fact that the defendant places so much stress along the line of his entire defense on the liberty which should be accorded to the press, it may as well be said here as elsewhere that it is a radical misconception of the scope of the constitutional protection to indulge the belief that a person may print and publish, *ad libitum,* any matter, whatever the substance or language, without accountability to law. Liberty in all its forms and assertions in this country is regulated by law. It is not an unbridled license. Where vituperation or licentiousness begins, the liberty of the press ends. While the genius of our institutions of government accords the largest liberality in the utterance of private opinion, and the widest latitude in polemics, touching questions of social ethics, political and domestic economy, and the like, it must ever be kept in mind that this invaluable privilege is not paramount to the golden rule of every civilized society, *sic utere tuo ut non alienum laedas,*—'so exercise your own freedom as not to infringe the rights of others or the public peace and safety.' 2 Story Const. §1888.

"While happily we have outlived the epoch of censors and licensors of the press, to whom the publisher must submit his matter in advance, respon-

sibility yet attaches to him when he transcends the boundary line where he outrages the common sense of decency, or endangers the public safety. As said by that eminent jurist, Judge Story (Id. §§1884–1887):

> "'There is a good deal of loose reasoning on the subject of the liberty of the press, as if its inviolability were constitutionally such that, like the king of England, it could do no wrong, and was free from every inquiry, and afforded a perfect sanctuary for every abuse; that, in short, it implied a despotic sovereignty to do every sort of wrong without the slightest accountability to private or public justice. Such a notion is too extravagant to be held by any sound constitutional lawyer, with regard to the rights and duties belonging to governments generally or to the state governments in particular. If it were admitted to be correct, it might be justly affirmed that the liberty of the press was incompatible with the permanent existence of any free government. . . . In short, is it contended that the liberty of the press is so much more valuable than all other rights in society that the public safety, nay, the existence of the government itself, is to yield to it? It would be difficult to answer these questions in favour of the liberty of the press without at the same time declaring that such a license belonged and could belong only to a despotism, and was utterly incompatible with the principles of a free government.'

JURY TO DECIDE

"In a government of law the law-making power must be recognized as the proper authority to define the boundary line between license and licentiousness,

and it must likewise remain the province of the jury—the constitutional triers of the fact—to determine when that boundary line has been crossed.

"Laws of this character are made for society in the aggregate, and not in particular. So, while there may be individuals and societies of men and women of peculiar notions or idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such cannot be allowed as a standard by which its obscenity or indecency is to be tested. Rather is the test, what is the judgment of the aggregate sense of the community reached by it? What is its probable, reasonable effect on the sense of decency, purity, and chastity of society, extending to the family made up of men and women, young boys and girls,—the family which is the common nursery of mankind, the foundation rock upon which the state reposes?

"The question was asked with eloquent energy by the learned counsel, commenting on the term 'deemed' to be obscene, as employed by Mr. Justice Field in *Ex parte Jackson, supra:* Who is to deem, who is to judge, whether a given publication impinges upon the general sense of decency? Shall every postmaster have the power to deem the matter injurious to the public morals? Shall one postmaster deem a thing injurious and another harmless, and shall the freedom of the press be at the mercy of an indifferent lot of postmasters exercising no responsible discretion?

"The answer to this is, that asserted violations of this statute, like other criminal statutes, must be left to the final arbiter under our system of govern-

ment,—the courts. The jury, the legally constituted triers of the fact under the constitution, is to pass upon the question of fact. Under our institutions of government the panel of twelve are assumed to be the best and truest exponents of the public judgment of the common sense. Their selection and constitution proceed upon the theory that they most nearly represent the average intelligence, the common experience and sense, of the vicinage; and these qualifications they are presumed to carry with them into the jury-box, and apply this average judgment to the law and the facts.

"Sitting as the court does in this case, in the stead, of the jury, it may not apply to the facts its own method of analysis or process of reasoning as a judge, but should try to reflect in its findings the common experience, observation, and judgment of the jury of average intelligence. How would the language—the subject-matter—in this article from the pen of 'Richard V. O'Neill, M. D.' impress and affect the average man and woman of intelligence and sensibility? What is its probable effect upon society in general? How would such language and matter impress a public assembly of decent men and women? How would it be received in and affect the average family circle of 1,500 subscribers to whom the evidence shows this garbage was sent?

"The subjects discussed and the language employed are too coarse and indecent for the man of average education and refinement to recapitulate. They are so filthy in thought and impure in terms as not to admit of recitation without a shock to the common sense of decency and modesty; and it does seem to me that it is not too much to say that no

ordinary mind can subject itself to the repeated reading and contemplation of such subjects and language without the risk of becoming indurated to all sense of modesty in speech and chastity in thought.

"The appetite for such literature increases with the feeding. The more it is pandered to, the more insatiable its craving for something yet more vicious in taste. And while it may be conceded to the contention of counsel that the Federal Government, under its constitutional limitations, ought not to take upon itself the office of *censor morum,* nor undertake to legislate in regulation of the private morals of the people, yet Congress may, as the basis of legislation of this character, have regard to the common *consensus* of the people that a thing is *malum in se,*—is hurtful to the public morals,—endangering the public welfare, and therefore deny to it as a vehicle of dissemination the use of its post-offices and post-roads, devised and maintained by the government at the public expense for the purpose of promoting the public welfare and common good.

SOCIAL COMPACT

"Reduced to its actual essence, the ultimate position of defendant is this: That although the language employed in the given article may be obscene, as heretofore defined, yet as it was a necessary vehicle to convey to the popular mind the aggravation of the abuses of sexual commerce inveighed against, and the object of the publisher being to correct the evil and thereby alleviate human condition, the author should be deemed a public benefactor, rather than a malefactor. In short, the proposition is that a man can do no public wrong who believes that what he does

is for the ultimate public good. The underlying vice of all this character of argument is that it leaves out of view the existence of the social compact, and the idea of government by law.

"If the end sought justifies the means, and there were no arbiter but the individual conscience of the actor to determine the fact whether the means are justifiable, homicide, infanticide, pillage, and incontinence might run riot; and it is not extravagant to predict that the success of such philosophy would remit us to that barbaric condition where

> "'No common weal to human tribe allied,
> Bound by no law, by no fixed morals tied,
> Each snatched the booty which his fortune brought,
> And wise in instinct each his welfare sought.'

"Guiteau stoutly maintained to the end his sanity and that he felt he had a patriotic mission to fulfill in taking off President Garfield, to the salvation of a political party. The Hindu mother cast her babe to the devouring Ganges to appease the gods. But civilized society says both are murderers. The mormon contends that his religion teaches polygamy and there is a school of so-called 'modern thinkers' who would abolish monogamy, and erect on the ruins the flagrant doctrine of promiscuity, under the disguise of the affinities. All these claim liberty of conscience and thought as the basis of their dogmas, and the *pro bono publico* as the strength of their claim to indulgence. The law against adultery itself would lie dormant if the libertine could get the courts to declare and the jury in obedience thereto to say that if he invaded the sanctuary of conjugal life under

the belief that the improvement of the human race demanded it he was not amenable to the statute.

"Society is organized on the theory, born of the necessities of human well-being, that each member yields up something of his natural privileges, predilections, and indulgences for the good of the composite community, and he consents to all the motto implies, *salus populi suprema est lax;* and as no government can exist without law, the law-making power, within the limits of constitutional authority, must be recognized as the body to prescribe what is right and prohibit what is wrong. It is the very incarnation of the spirit of anarchy for a citizen to proclaim that like the heathen he is a law unto himself.

SEX CHASTELY DISCUSSED

"Our attention has been called to a newspaper report of an opinion delivered by the Supreme Court of New South Wales in the case of Mrs. Besant for the publication of a pamphlet on 'The Law of Population,' in which the court held that the defendant was within the pale of legitimate discussion of a subject of vital importance. We have not access to this pamphlet to determine the character of the language employed. We can conceive, and are free to say, that the subject of the increase and the prevention of population might be publicly discussed, as stated in this opinion, 'in a decent way,' without coming under the ban of obscenity. This opinion states that 'it is right to advocate in the abstract the expediency of checking the advancing tide of population; and it appears to me impossible to contend that the thing

which tells how this may be done is obscene, if it goes no further than is necessary for this purpose.'

"The scope of this language is to be restrained, presumably, by the facts of the particular case. If, however, it is to be taken as asserting that the publisher of a promiscuous newspaper may discuss the policy and the means of preventing conception, and that the language deemed essential to convey the meaning of the writer to the popular mind may be employed regardless of its broad vulgarity and obscenity, without legal responsibility, it cannot have my assent. The problem of population, and other questions of social ethics and the sexual relations, may be publicly discussed on such a high plane of philosophy, thought, and fitness of language as to make it legally unexceptional. They may be discussed so as to be plain, yet chaste, so as to be instructive and corrective without being coarse, vulgar, or seductive. But when such publication descends to the low plane of indecent illustrations and grossness of expression as adopted by Dr. O'Neill, it loses all claim to respectability.

"This article sets forth with a bluntness of speech and a baldness of immodesty of expression instances of bestiality and human depravity not at all germane to the subject of the sexual relations, which is the professed object of the publication of 'Lucifer': and when the defendant and his coadjutors say that such language and subject-matter are only impure to the overprudish it but illustrates how familiarity with obscenity blunts the sensibilities, depraves good taste, and perverts the judgment. To the pure all things are pure, is too poetical for the actualities of practical life.

"There is in the popular conception and heart such a thing as modesty. It was born in the Garden of Eden. After Adam and Eve ate of the fruit of the tree of knowledge they passed from that condition of perfectibility which some people nowadays aspire to, and, their eyes being opened, they discerned that there was both good and evil; 'and they knew that they were naked; and they sewed fig leaves together, and made themselves aprons.' From that day to this civilized man has carried with him the sense of shame—the feeling that there were some things on which the eye—the mind—should not look; and where men and women became so depraved by the use, or so insensate from perverted education, that they will not veil their eyes, nor hold their tongues, the government should perform the office for them in protection of the social compact and the body politic. . . .

"My conclusion from the facts and the law is that the defendant is guilty."

5. The People v. Muller

In New York State the Court of Appeals decided as follows:

Andrews, J.: "The first count in the indictment charges the defendant with selling indecent and obscene photographs, representing nude females in lewd, obscene, indecent, scandalous and lascivious attitudes and postures, and the second count charges him with having in his possession divers lewd, scandalous, obscene and indecent photographs of the same character, with intent to sell the same. Section 317 of the Penal Code declares among other things that a person who sells, lends, gives away, or

offers to give away, or shows, or has in his possession with intent to sell, or give away, or to show, or advertises, or otherwise offers for loan, gift, sale, or distribution, an obscene or indecent book, writing, paper, picture, drawing or photograph, is guilty of a misdemeanour.

"The evidence on the trial in support of the indictment related to nine photographs produced before the jury, which were proved to have been sold by the defendant in the ordinary course of his employment as a clerk in a store for the sale of books, pictures and photographs, in the City of New York. The record contains no special description of the photographs, except that it appears that they represented nude females, and were photographic copies of paintings which had been exhibited in the Salon in Paris, and one of them at the Centennial Exhibition in Philadelphia, and that among them were pictures designated 'La Asphyxie,' 'After the Bath,' and 'La Baigneuse.'

"The jury by their verdict of guilty necessarily found that the photographs were obscene and indecent. The exhibits were produced on the argument of the appeal at the General Term, and the court in its opinion expressed its concurrence with the finding of the jury, saying that they might very well have found that the photographs were both indecent and obscene. They were not produced in this court, and we are unable to pass upon the question of their obscenity or indecency from an inspection of the pictures themselves. If the defendant's counsel desired to insist in this court that the photographs were not in fact indecent or obscene, and that this appeared from the photographs themselves and that the find-

ing of the jury was therefore without evidence to support it, it was his duty to have furnished them as a part of the record, or to have insisted upon their production by the district attorney. Upon the case as presented we must assume that the pictures were of the character described in the indictment.

"But exceptions were taken by the defendant on the trial which render it necessary to consider to some extent the scope of the statute, the method of trying the issue of obscenity and indecency, and the relevancy of proof of an innocent intent on the part of a defendant charged with a violation of the statute. It is to be observed that the statute does not undertake to define obscene or indecent pictures or publications. But the words used in the statute are themselves descriptive. They are words in common use and every person of ordinary intelligence understands their meaning, and readily and in most cases accurately applies them to any object or thing brought to his attention which involves a judgment as to the quality indicated. It does not require an expert in art or literature to determine whether a picture is obscene or whether printed words are offensive to decency and good morals.

"These are matters which fall within the range of ordinary intelligence, and a jury does not require to be informed by an expert before pronouncing upon them. It is evident that mere nudity in painting or sculpture is not obscenity. Some of the great works in painting and sculpture, as all know, represent nude human forms. It is a false delicacy and mere prudery which would condemn and banish from sight all such objects as obscene, simply on account of their nudity. If the test of obscenity or indecency in a picture or

statue is its capability of suggesting impure thoughts, then indeed all such representations might be considered as indecent or obscene. The presence of a woman of the purest character and of the most modest behaviour and bearing may suggest to a prurient imagination images of lust, and excite impure desires, and so may a picture or statue not in fact indecent or obscene.

"The test of an obscene book was stated in Queen v. Hecklin (L. R., 3 Q. B. 369) to be, whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences, and who might come into contact with it. We think it would also be a proper test of obscenity in a painting or statue, whether the motive of the painting or statue, so to speak, as indicated by it, is pure or impure, whether it is naturally calculated to excite in a spectator impure imaginations, and whether the other incidents and qualities, however attractive, were merely accessory to this as the primary or main purposes of the representation.

"The defendant on the trial called as witnesses an artist who had practised painting for many years, and also a person who had been engaged in the study of art. They were asked by defendant's counsel whether there was a distinguishing line, as understood by artists, between pure art and obscene and indecent art. The question was objected to by the prosecutor and excluded by the court. The issue to be tried was whether the particular photographs in question were obscene or indecent. The defendant was entitled to prove in his defense any facts legitimately bearing upon this issue. The fact that the original pictures

of which the photographs were copies had been exhibited in the Salon in Paris was admitted by the prosecution, and it was proved that one of them had been publicly exhibited in Philadelphia. But this did not, as a matter of law, exclude a finding by the jury that the photographs were obscene and indecent. It is not impossible certainly that the public exhibition of indecent pictures may have been permitted in Paris or Philadelphia, and the fact that a picture had been publicly exhibited would not necessarily determine its character as decent or indecent. Indeed there is but little scope for proof bearing upon the issue of decency or obscenity, beyond the evidence furnished by the picture itself.

"The question which was excluded, if intended to bring out the fact that pictures might be either decent or indecent, and that the canons of pure art would accept those of one class and reject those of the other, was properly overruled as an attempt to prove a self-evident proposition. If the question was intended to be followed by proof that, according to the standard of judgment adopted and recognized by artists, the photographs in question were not obscene or indecent, it was properly rejected for the reason that the issue was not whether in the opinion of witnesses, or of a class of people, the photographs were indecent or obscene, but whether they were so in fact, and upon this issue witnesses could neither be permitted to give their own opinions, or to state the aggregate opinion of a particular class or part of the community. To permit such evidence would put the witness in the place of the jury, and the latter would have no function to discharge. The testimony of experts is not admissible upon matters of judgment

within the knowledge and experience of ordinary jurymen (1 Greenl. Ev., §440). The question whether a picture or writing is obscene is one of the plainest that can be presented to a jury, and under the guidance of a discreet judge there is little danger of their reaching a wrong conclusion. The opinions of witnesses would not aid the jury in reaching a conclusion, and their admission would contravene the general rule that facts and not opinions are to be given in evidence.

"The defendant's counsel at the conclusion of the evidence made several requests to charge, which were denied by the trial judge. The leading purpose of those requests was to induce the court to lay down the rule that the intent of a defendant in selling a picture claimed to be indecent and obscene is an important element in determining his guilt. The statute makes the selling of an obscene and indecent picture a misdemeanour. There is no exception by reason of any special intent in making the sale. The object of the statute was to suppress the traffic in obscene publications, and to protect the community against the contamination and pollution arising from their exhibition and distribution. It would, we conceive, be no answer to an indictment under the statute for the sale of an obscene picture, that it was sold to a person not liable to be injured by it, or that it was a picture, in respect to execution, of distinguished merit. In Queen v. Hecklin (supra), the question was whether a certain book was obscene and liable to seizure for that reason under an English statute. It appeared that it was published to expose the alleged immoralities of private confession in the Roman Catholic Church. But the court having found that

passage purporting to be extracts from the writings of Roman Catholics were obscene in fact, it was held that the intent of the publication, however innocent, was no answer to the proceeding.

"We do not doubt that whether a publication is obscene or not may, in some cases, depend on circumstances. For example, a medical book for the instruction of medical men may contain illustrations suitable and proper as a part of the work, but which, if detached and published alone for circulation, might be deemed indecent within the statute. In the present case there was no evidence to which the requests to charge were applicable. The pictures in question were kept for general sale, except that they were not sold to boys under twenty-one years of age. The requests, as applied to the case, were a series of abstract propositions having no relation to the issue, and were on that ground, independently of any other consideration, properly denied. We find no error in the record. The case seems to have been fairly tried and was submitted to the jury in a careful charge, and with the verdict of the jury this court cannot interfere. The statute is an important one, and while it should have a reasonable and not a strained construction, at the same time it ought to have such a practical interpretation by the court and jury, as will subserve the important purpose of its enactment.

"The judgment should be affirmed.

"All concur.

"Judgment affirmed."

6. Commonwealth of Massachusetts v. Buckley

The Statute of Massachusetts, to be found on another page, bars every publication containing obscene,

indecent and impure language manifestly tending to corrupt the morals of youth. The sound common sense of the Massachusetts judges in interpreting this statute is strikingly exhibited throughout the Massachusetts decisions interpreting and applying the anti-obscenity statute of the Commonwealth. These decisions are a safe guide to the courts of thirteen other states whose anti-obscenity statutes follow the Massachusetts form in expressly condemning a publication if any part of it contravenes the statute.

A typical case is printed substantially in full here. It had to do with a notorious book which has had a stupendous sale. It has been dramatized, and its depraving lessons carried to the minds of millions, old and young. It made big money for its author, its publishers and the newspapers which advertised and extolled it. Some publications printed the story in serial form. Its depraving influence still continues throughout the country except in the good old Bay State. Following is the Massachusetts case in which this depraving book was suppressed in the native home of America's noblest literature.

Statement of the Case

" Indictment, found and returned in the Superior Court for the county of Suffolk on February 8, 1908, under R. L. c. 212, §20, charging the defendant with selling a certain printed book entitled ' Three Weeks,' containing in and upon certain pages certain obscene, indecent and impure language, manifestly tending to corrupt the morals of youth, as set forth in specifications filed by the Commonwealth.

" In the Superior Court the defendant was tried before *Brown, J.* Before the jury were impanelled,

the defendant filed a motion to quash the indictment, which is referred to in the opinion. The motion was denied by the judge, and the defendant excepted.

"The whole of the book was introduced in evidence by the Commonwealth, and the sale of the book was admitted by the defendant. The only other testimony introduced by the government was the reading of the portions of the book specified in the indictment and set forth in the Commonwealth's specifications. The defendant introduced no evidence. . . .

Charge to the Jury

"This defendant is charged with selling a certain printed book which contains, in the language of the indictment, certain obscene, indecent and impure language, manifestly tending to the corruption of the morals of youth. That is the charge upon which he is tried. The issue is very simple. It is for you to determine whether in your opinion this language is obscene, impure or indecent, and manifestly tends to the corruption of youth. The allegation in the indictment that the language is so bad that it ought not to be set out, is not to be considered by you at all, because you have the language itself, and it is from that you must form your conclusions. The language of the pleader is not to be considered by you at all.

"Now, what does the statute mean? This statute was intended to protect public morals, particularly the morals of that part of the public who, by reason of tender age or any other reason, have minds open, susceptible to influences of this sort. You are to determine from the language used, and from such other

parts as are necessary to explain that language, whether that is obscene and impure, and whether it manifestly tends to the corruption of youth.

"Now, language to be obscene—perhaps you know as well without my trying to explain it as you will afterward—but obscenity means offensive to morality, to chastity—indecent, nasty. 'Impure' explains itself. Language is offensive, impure and indecent when it manifestly tends to incite in the minds of people susceptible to such influences obscene thoughts, impure thoughts, indecent thoughts. Is it language which has a tendency in your opinion to incite impure thoughts in the minds of people into whose hands it may come? Does it corrupt their morals? Does it excite their sexual passions? Now, the fact is not whether it tends to excite those feelings in your minds or not, but whether it has a tendency, a manifest tendency, to excite those feelings in the minds of youths into whose hands it might come. . . . Does it have that tendency? Does it have a manifest tendency? Are you able by taking the language and reading it to say that it manifestly tends to corrupt the morals of youth? If you cannot say that, it makes no difference what anybody else thinks about it, and you must return a verdict of not guilty. If you have reasonable doubt about it, you must return a verdict of not guilty.

"It is entirely immaterial whether other books are as bad or worse or better than this. You cannot compare them in that way. You are not trying any book except this, and only such parts of this as the government complains of; and it makes no difference whether you think there are other books in circulation worse than this or not; you are only trying this

one. It makes no difference what the object in writing this book was, or what its whole tone is, if these pages that are complained of, the language that is set out in the bill of particulars, is in your mind obscene, impure, indecent, and manifestly tending to the corruption of youth, then you must find a verdict of guilty. It is for you to say. You are to use your own experience and your judgment, acting under the responsibility of your oaths, and return such a verdict as you think you ought to. If you have any doubt, reasonable doubt, as to the effect of this language upon the minds of youth, or anybody else into whose hands it may come, then you must give the defendant the benefit of that doubt."

The jury returned a verdict of guilty, and the defendant was sentenced by the judge to pay a fine of $100 and to stand committed until the sentence was performed. On appeal from the sentence to the Supreme Judicial Court of Massachusetts, it was sustained in the following opinion:

Hammond, J.: "This is an indictment under R. L. c. 212, §20, charging the defendant with selling 'a certain printed book' which contained 'certain obscene, indecent and impure language, and manifestly tending to the corruption of the morals of youth.' The case is before us upon the defendant's exceptions to the overruling of the motion to quash the indictment and to the refusal of the judge to give certain rulings requested at the trial. It is stated in the defendant's brief that the questions raised in the motion to quash, so far as now relied upon, are covered in his request for rulings. We therefore shall consider that motion no further, but shall pass at once to the questions of law which arise

out of the refusal to give the rulings requested at the trial.

"There were twenty-six requests, none of which was given in the language asked for, although the law contained in some of them, so far as material to the case, was adopted by the judge in his charge. It seems best to treat the question in a topical way rather than to speak of the requests individually. This is substantially the way in which the questions are discussed upon the defendant's brief.

"The defendant strongly contends that the judge should have defined at greater length than he did the terms 'obscene,' 'indecent,' 'impure' and 'manifestly.' While it is true perhaps that by illustration or the use of synonyms the judge might have explained more fully the meaning of these terms, still it is to be remembered that they are not technical terms. They are common words and may be assumed to be understood in their common meaning by an ordinary jury. So far as the judge undertook to define, we see no error, and we cannot say as matter of law that his failure to define more at length was erroneous in law or prejudicial to the defendant.

"It is strongly contended by the defendant that the language complained of is neither obscene nor indecent nor impure, and that it does not manifestly tend to the corruption of the morals of youth; and in support of his contention the following language is used in his brief:

"'The language of those parts of the book specified in the indictment is neither impure nor indecent within the meaning of the statute. No word, sentence or paragraph can be pointed out which can be described by either of these terms. If the statute is

to be construed to cover all language which conveys or suggests thoughts of sexual relations, or even illicit intercourse, it will certainly include a great part of what is considered good and decent literature. Indecent and impure language cannot be such as is widely read and openly discussed. The very terms themselves import that matters thus described cannot be openly read or decently discussed; yet it is submitted that the book in question can be widely and openly read and discussed without causing general corruption of morals or denoting general depravity.

"'The language referred to does not manifestly tend to the corruption of youth. It is not sufficient, under this clause of the statute that the language be such as might tend to corrupt the thoughts of the young. It must obviously and incontrovertibly have that tendency. If there is any room for doubt upon that point the statute does not apply. The language of this book is not such that it can properly be said "manifestly" to tend to corrupt or deprave.'

"But we think that the case was properly submitted to the jury. It could not be ruled as matter of law that the jury could not find the book within the prohibition of the statute. In prosecutions like this, considerations similar to those thus urged in this case are frequently, if not usually presented, in behalf of the defendant, and they are entitled to consideration. But after all there is a practical side. Doubtless an artist, when looking in his studio upon the model before him, in the figure of a perfectly formed young woman standing completely nude, may be so much under the influence of the æsthetic principles of his profession, and so intent in his wish to copy with perfect exactness the living picture, as not

to have one obscene, indecent or impure thought or the slightest sexual desire, but on the contrary he may be perfectly absorbed in the purest feeling of admiration and wonder at the artistic beauty of the creation before him. But it by no means follows that if he should open wide the doors of his studio and fill it with people from the crowded streets, they would be moved by the same lofty and pure feelings. And in passing upon the question whether such an exhibition was obscene or tended to corrupt the morals of youth, a jury would not be justified in considering only the feeling of the artist. They should consider that not every person is so much absorbed in the artistic features, and that the exhibition of such a model may rather arouse in many spectators passions of a merely animal nature.

"And so a reader may be so interested in the development of the character of a woman—no matter how wanton—as a merely psychic study, as to read such a book as this without a single impure or unworthy thought. And it may be that the author of this book was in full sympathy with such a state of mind when she wrote it and sent it forth to the reading public. It may be also that the literary style of the book is such that many a reader finds that to be the most attractive feature; and the thinly veiled allusions to an intense desire for sexual intercourse and to the arts of seduction leading to it and exciting it may be unheeded by him. But such an author cannot expect that the reading public as a whole will so read her production. Descriptions of seductive actions and of highly wrought sexual passion, even when sanctified by what the author has called 'love,' are very likely to be seen in another

light tending toward the obscene and impure. And an author who has disclosed so much of the details of the way to the adulterous bed as the author of this book has and who has kept the curtains raised in the way that she has kept them, can find no fault if the jury say that not the spiritual but the animal, not the pure but the impure, is what the general reader will find as the most conspicuous thought suggested to him as he reads.

"The twenty-sixth request was properly refused; and the language of the charge sufficiently and accurately stated the law on the subject-matter of this request. Although the twenty-first, twenty-second and twenty-third rulings were not given in their precise language, yet their subject was sufficiently treated in the charge. We see no error in the manner in which the court dealt with any of the requests. *Exceptions overruled.*"

Foregoing are but a few of the cases which demonstrate that the officials of the United States charged with the duty, have only to present the evidence openly surrounding them everywhere to the courts in order to bring down the hand of the law upon the traffickers in pornography. Just one of them placed behind prison bars (especially if he were one of the men of great wealth now openly engaged in this filthy business) would decrease by a half, at least, the nation-wide circulation of printed obscenity which at present is besmirching and defiling the land.

7. American Laws and Statutes Against Obscenity

General Laws of Massachusetts, Chapter 272, Section 28

Whoever imports, prints, publishes, sells or distributes a book, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to corrupt the morals of youth, or an obscene, indecent, or impure print, picture, figure, image or description, manifestly tending to corrupt the morals of youth, or introduces into a family, school or place of education, or buys, procures, receives or has in his possession any such book, pamphlet, ballad, printed paper, obscene, indecent or impure print, picture, figure, image or other thing, either for the purpose of sale, exhibition, loan or circulation or with intent to introduce the same into a family, school or place of education, shall be punished by imprisonment for not more than two years and by a fine of not less than one hundred nor more than one thousand dollars.

New York's Penal Law, Section 1141

Obscene prints and articles. 1. A person who sells, lends, gives away or shows, or offers to sell, lend, give away, or show, or has in his possession with intent to sell, lend or give away, or to show, or advertises in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image,

or any written or printed matter of an indecent character; or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, or who designs, copies, draws, photographs, prints, utters, publishes, or in any manner manufactures, or prepares any such book, picture, drawing, magazine, pamphlet, newspaper, story paper, writing, paper, figure, image, matter, article or thing, or who writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting so to do, where, how, of whom, or by what means any, or what purports to be any, obscene, lewd, lascivious, filthy, disgusting or indecent book, picture, writing, paper, figure, image, matter, article or thing, named in this section can be purchased, obtained or had or who has in his possession, any slot machine or other mechanical contrivance with moving pictures of nude or partly denuded female figures which pictures are lewd, obscene, indecent or immoral, or other lewd, obscene, indecent or immoral drawing, image, article or object, or who shows, advertises or exhibits the same, or causes the same to be shown, advertised, or exhibited, or who buys, owns or holds any such machine with the intent to show, advertise or in any manner exhibit the same; or who,

2. Prints, utters, publishes, sells, lends, gives away or shows, or has in his possession with intent to sell, lend, give away or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or

pictures, or stories of deeds of bloodshed, lust or crime; or who,

3. In any manner hires, employs, uses or permits any minor or child to do or assist in doing any act or thing mentioned in this section, or any of them,

Is guilty of a misdemeanour, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or be fined not less than fifty dollars nor more than one thousand dollars or both fine and imprisonment for each offense.

NOTE: Because of judicial emasculation of the New York statute, the Clean Books League advocates the addition of a new subdivision at the end of the present law to read as follows:

"4. The words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' and 'disgusting,' and each of them, as used in this section, shall be taken and construed with full force and effect in their commonly and generally accepted meaning and signification as required by the ordinary rules of statutory construction. An indictment, information, complaint or other charge may be based upon the whole or exclusively upon a part or parts of any publication, or written or printed matter, but upon the trial any other part or parts may be offered and, if relevant and material, received in evidence. Whether the matter set out in the indictment, complaint, information or other charge offend against this section shall upon the trial be a question of fact to be decided by the trier or triers of fact unless reasonable minds would not differ as to the lawful character of the matter."

The adoption of the proposed amendment, known as the Clean Books Bill, would merely bring the construction of the New York law into harmony with the interpretation of the Federal anti-obscenity statutes by the United States courts.

ILLINOIS CRIMINAL CODE, CHAPTER 38, SECTION 223

Whoever brings, or causes to be brought into this State, for sale or exhibition, or shall sell or offer to sell, or shall give away or offer to give away, or have in his possession, with or without intent to sell

or give away, any obscene and indecent book, pamphlet, paper, drawing lithograph, engraving, daguerreotype, photograph, stereoscopic picture, model, cast, instrument or article of indecent or immoral use, or shall advertise the same for sale, or write or cause to be written, or print or cause to be printed, any circular, handbill, card, book, pamphlet, advertisement, or notice of any kind, or shall give information orally, stating when, how, or of whom or by what means any of the said indecent and obscene articles and things hereinbefore mentioned can be purchased or otherwise obtained, or shall manufacture, draw, and expose, or draw with intent to sell, or to have sold, or print any such articles, shall be confined in the county jail not more than six months or be fined not less than one hundred dollars nor more than one thousand dollars for each offense—one half of said fine to be paid to the informer upon whose evidence the person so offending shall be convicted, and one half to the school fund of the county in which the said conviction is obtained.

Section 224: *Depositing in post-office—with common carrier; Carrying; Telling where to buy:* If any person shall deposit or cause to be deposited in any post-office within this State, or place in charge of any express company or person connected therewith, or of any common carrier or other person, any of the obscene and indecent articles and things mentioned in the preceding section, or any circular, handbill, card, advertisement, book, pamphlet, or notice of any kind, or shall give oral information stating where, how or of whom such indecent and obscene articles or things can be purchased or otherwise obtained in any manner, with the intent of having the same conveyed by

mail or express, or in any other manner, or if any person shall knowingly or wilfully receive the same with intent to carry or convey, or shall carry or convey the same by express, or in any other manner (except in the United States mail) he shall be subject, for each offense, to the same fines and penalties as are prescribed in the preceding section and said fine shall be divided and paid in the same manner as therein provided.

UNITED STATES CRIMINAL CODE, SECTION 211

Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and every letter, packet, or package, or other mail matter containing any filthy, vile or indecent thing, device, or substance; and every paper,

writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can be, used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing, is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post-office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than five thousand dollars, or imprisonment not more than five years, or both. And the term "indecent" within the intendment of this section shall include matter of a character tending to incite arson, murder, or assassination.

UNITED STATES CRIMINAL CODE, SECTION 245

Whoever shall bring or cause to be brought into the United States, or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier, for carriage from one State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction

of the United States, through a foreign country, to any place in or subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States to a foreign country, any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character, or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned articles, matters, or things may be obtained or made; or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be fined not more than $5,000 or imprisoned not more than five years, or both. (35 Stat. 1138, 41 Stat. 1060.)

The foregoing statutes have been given in full, for they represent a composite of the laws of the United States and of the several States and dependencies of the United States against the distribution of obscenities. New Mexico and Alaska appear to be without domestic anti-obscenity laws but are, of course, protected by the Federal statutes. All the laws are in substance similar to those printed in full. Those not so presented are referred to in the following list, with citations, which will enable any one to lay hand

upon them with little effort. Also, references to the law of Canada and to the Tariff Act of 1922 are given. It will bear mention here that Canada excludes from circulation within the Dominion ninety-four publications regularly issued in the United States.

ADDITIONAL LAWS AND STATUTES AGAINST OBSCENITY

Alabama Criminal Code, Vol. II, Chapter 195, Section 5014.

Arizona Revised Statutes, Penal Code, Chapter 9, Section 313.

Arkansas, Laws of, Page 100, Section 1.

California Penal Code, Section 311, Subdivisions 3, 4, Sections 312, 313, 314.

Colorado Compiled Laws, Chapter 153, Sections 218, 219, 220.

Connecticut Revised Statutes, Chapter 333, Section 6397.

Delaware Revised Code, Chapter 70, Section 40.

Florida Revised General Statutes, Div. 5, Part 1, Title 2, Art. 10, Section 5438.

Georgia Penal Code, Article 7, Section 385.

Idaho Compiled Statutes, Title 59, Art. 9, Section 8303, Subdivisions 3, 4, 5.

Indiana Revised Statutes, Chapter 5, Art. 5, Sections 2359, 2360.

Iowa Compiled Statutes, Chapter 592, Sections 13189, 13190, 13191.

Kansas Revised Statutes, Chapter 21, Article 2, Section 1102.

Kentucky Statutes, Compilation of 1915, Chapter 36, Sections 1352, 1354.

Louisiana Revised Statutes, Page 148, Section 1.

Maine Statutes, Revision of 1916, Chapter 126, Section 23.

Maryland, Bagby's Code, Article 27, Sections 371, 372.

Michigan Compiled Laws, Chapter 259, Sections 15474, 15476.

Minnesota General Statutes, Chapter 98, Section 8705.

Mississippi, Hemingway's Code, Section 1025.

Missouri Revised Statutes, Article 8, Chapter 24, Sections 3523, 3524.

Montana Penal Code, Chapter 31, Section 11136, Subdivisions 3 and 4.

Nebraska Compiled Statutes, Chapter 8, Article 6, Section 9779.

Nevada, Laws of, Revision of 1912, Chapter 14, Section 6461.

New Hampshire Public Statutes, Chapter 265, Sections 6, 9.

New Jersey Compiled Statutes, Page 1762, Section 53.

North Carolina Statutes, Article 24, Chapter 82, Section 348.

North Dakota Penal Code, Chapter 42, Section 9654.
Ohio General Code, Title 1, Chapter 12, Sections 13035, 13036.
Oklahoma Statutes, Compilation of 1921, Chapter 6, Article 37, Section 1886, Subdivision 3.
Oregon Laws, Compilation of 1920, Title 19, Chapter 7, Section 2094.
Pennsylvania Statutes, Sections 7987, 7988 of Law Digest of Pennsylvania.
Rhode Island General Laws, Chapter 399, Title 39, Section 13.
South Carolina Criminal Laws, Chapter 6, Section 13.
South Dakota Revised Code, Title 4, Chapter 2, Article 4, Section 3884.
Tennessee Compiled Statutes, Chapter 8, Article 2, Section 6770.
Texas Penal and Criminal Code, Chapter 5, Article 508.
Utah Penal Code, Title 119, Chapter 32, Section 8144.
Vermont, Laws of, Revision of 1917, Title 40, Chapter 307, Section 7021.
Virginia Code, Title 40, Chapter 183, Section 4549.
Washington Compiled Statutes, Title 14, Chapter 6, Section 2459.
West Virginia, Barnes' Code, Chapter 149, Section 11.
West Virginia Constitution, Article III, Section 7.
Wisconsin Statutes, Compilation of 1923, Chapter 351, Section 4590.
Wyoming Compiled Statutes, Chapter 454, Section 7200.
District of Columbia, Code of Law, Chapter 19, Section 872.
Philippine Islands, Appendix to Penal Code, Libel Law, Section 12.
Porto Rico Penal Code, Section 283, Subdivisions 3 and 4.
Hawaii Revised Laws, Chapter 254, Section 4129.
Canadian Criminal Code, Part V, Sections 207, 209.
Canadian Customs Tariff, Section 11, Item 1201, Section c.
United States Tariff Act of 1922, Chapter 356, Section 305.

Printed in the United States of America

DATE DUE

WITHDRAWN
from
Funderburg Library

179.1 F75 c.1
Ford, John, 1862- 150101 000
Criminal obscenity; a plea for
3 9315 00002148 2
MANCHESTER COLLEGE LIBRARY

179.1
F75
Ford
Criminal obscenity

JAN31 70 66060
FEB6 71 repair

179.1
F75 13924

Manchester College Library

RULES

1. Books of fiction may be kept two weeks and may be renewed once for the same period. The time limit for books of non-fiction shall be determined by the librarian.

2. A fine of one cent a day shall be charged on each book kept overtime, except reserved books. A fine of two cents per hour will be charged for reserved books which are not returned at the time specified by the librarian when the book is taken. No book will be issued to persons incurring such fines until they have been paid.

3. All injuries to books beyond reasonable wear and all losses shall be made good to the satisfaction of the librarian.